No. 88-266-CFX
Status: GRANTED

Title: Oklahoma Tax Commission, Petitioner
v.
Jan Graham, et al.

Docketed:
August 12, 1988

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Alexander,Stanley J., Miley,David Allen

Counsel for respondent: Rabon,Bob

Entry	Date	Note	Proceedings and Orders
1	Aug 12 1988	G	Petition for writ of certiorari filed.
3	Sep 2 1988	X	Brief of respondents Jan Graham and Chickasaw Nation in opposition filed.
2	Sep 7 1988		DISTRIBUTED. September 26, 1988
4	Oct 3 1988		Petition GRANTED.
			**********
5	Nov 14 1988		Record filed.
		*	Certified copy of C. A. Proceedings received.
6	Nov 16 1988		Joint appendix filed.
7	Nov 16 1988		Brief of petitioner Oklahoma Tax Commission filed.
8	Nov 21 1988	G	Motion of Stanley J. Alexander, Esquire, to permit David Allen Miley, Esquire, to present oral argument pro hac vice filed.
9	Nov 21 1988		Lodgings received. (Volumes I and II).
10	Nov 28 1988		DISTRIBUTED. Dec. 2, 1988. (Motion of Stanley J. Alexander, Esquire to permit David Allen Miley, Esquire to present oral argument).
11	Dec 5 1988		Motion of Stanley J. Alexander, Esquire, to permit David Allen Miley, Esquire, to present oral argument pro hac vice GRANTED.
19	Dec 13 1988		Brief amici curiae of Wyandotte Tribe of Oklahoma, et al. filed.
12	Dec 16 1988		Brief amicus curiae of Inter-Tribal Council of the Five Civilized Tribes filed.
13	Dec 16 1988		Brief amicus curiae of Otoe-Missouria Tribe of Indians filed.
14	Dec 16 1988		Brief of respondent Jan Graham and Chickasaw Nation filed.
15	Dec 16 1988		Brief amici curiae of Seneca Nation of Indians, et al. filed.
16	Dec 17 1988		Brief amicus curiae of Sac and Fox Nation, et al. filed.
17	Jan 4 1989		CIRCULATED.
20	Jan 6 1989		SET FOR ARGUMENT TUESDAY, FEBRUARY 21, 1989. (3RD CASE.)
21	Jan 12 1989	X	Reply brief of petitioner filed.
22	Feb 11 1989		Record filed.
		*	Certified copy of original record on appeal, 1 volume, and 1 volume of supplemental record received.
23	Feb 21 1989		ARGUED.

88-266

No._____

In The
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF OKLAHOMA, *ex rel.*,
OKLAHOMA TAX COMMISSION, PETITIONER

v.

JAN GRAHAM, *et al.*, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in determining that removal jurisdiction was proper for an action brought against an Indian tribe in state court?

2. Does tribal sovereign immunity prohibit an action brought by the State to enforce the collection and remittance requirements of its tax laws on commercial activities conducted by an Indian tribe on off-reservation lands?

LIST OF PARTIES

The Petitioner is the State of Oklahoma, ex rel., Oklahoma Tax Commission.

The Respondents are Jan Graham and the Chickasaw Nation.

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v.

JAN GRAHAM, *et al.*, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, State of Oklahoma, ex rel., Oklahoma Tax Commission, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 18, 1988.

OPINIONS BELOW

The order and judgment of the Court of Appeals, which is reported at 846 F.2d 1258, appears in Appendix A. The Order of this Court, which is reported at 108 S.Ct. 481, appears in Appendix B. The orders of the United States District Court for the Eastern District of Oklahoma, which are unreported, appear in Appendices D, E, and F.

JURISDICTION

The order and judgment of the Court of Appeals was entered on May 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title 28 United States Code §1441(a) and (b) are set forth at Appendix I.

Title 25 United States Code §§465 and 501 are set forth at Appendix G and H respectively. The relevant State taxing statutes, 68 Oklahoma Statutes §§232, 302, 302-1(a), 302-2(a), 302-3(a) and 1354 1(A), (E), (L) and (M) are set forth at Appendices J through O.

STATEMENT OF THE CASE

1. Nature of the Controversy.

The Chickasaw Nation (Tribe) conducts high stakes bingo games and sells cigarettes at a motel within the city limits of Sulphur, Oklahoma. The motel was purchased by the Chickasaw Nation from the Small Business Administration in 1972. The premises were conveyed to the United States of America in trust for the Tribe in August 1985 pursuant to the provisions of 25 U.S.C. §501 and 25 U.S.C. §465.

Oklahoma law requires vendors to collect and remit sales tax on bingo sales and cigarettes as well as on other items. 68 Okla. Stat. §1354. In addition, cigarette excise taxes are imposed on the consumer/user of cigarettes. 68 Okla. Stat. §§302, 302-1(a), 302-2(a) and 302-3(a). Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor and affixed to each package of cigarettes sold. 68 Okla. Stat. §302. Failure of a vendor to collect and remit state sales tax or to affix cigarette excise tax stamps to packages of cigarettes is grounds for seeking injunctive relief. 68 Okla. Stat. §232.

The Chickasaw Nation has neither collected and remitted state sales tax from its customers nor purchased and affixed state cigarette excise tax stamps to the packages of cigarettes sold.

2. The Proceedings Below.

The State brought an action in state court for injunctive relief against the Chickasaw Nation and its motel manager, Jan Graham, alleging that state taxes were not being collected and remitted in accordance with state law. The cause was removed to the United

States District Court for the Eastern District of Oklahoma by Jan Graham and the Chickasaw Nation pursuant to 28 U.S.C. §1441. The District Court, in denying the State's motion to remand, relied on *Montana v. Blackfeet Tribe of Indians*, 471 U.S.759 (1985) and found that an action to enforce state revenue statutes against activities of a federally recognized Indian tribe raised a federal question giving the court removal jurisdiction. App. D. The District Court then granted the motion to dismiss filed by Jan Graham and the Chickasaw Nation on the grounds of tribal sovereign immunity from unconsented suit without addressing the status of the land on which the commercial activities occurred. App. E. The State's motion for reconsideration was subsequently denied and the State appealed. App. F.

On appeal the Tenth Circuit affirmed the lower decisions finding "that removal was proper because of the constitutional grant of federal jurisdiction over Indian affairs," App. C, Page A-14 and, applying reservation case law to this off-reservation situation, held that tribal sovereign immunity barred this action against both Jan Graham and the Chickasaw Nation. App. C, Pages A-15 to A-16.

The Oklahoma Tax Commission then petitioned this Court for writ of certiorari to issue in order to review the decision of the Appeals Court. The Commission's petition was granted on December 7, 1987, App. B, and the judgment of the Appeals Court was vacated. The case was then remanded back to the Tenth Circuit for further consideration in light of *Caterpillar, Inc. v. Wiliams*, 482 U.S.___, 107 S.Ct. 2425 (1987).

On remand, the Tenth Circuit reasserted its previous opinion holding that removal jurisdiction was proper and the opinion in *Caterpillar* was inapposite to this case, App. A, Page A-2. The Tenth Circuit also reaffirmed its holding that the Tax Commission's suit was barred by tribal sovereign immunity.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision which is in conflict with applicable decisions of this Court. The Appeals Court has refused to apply the holding in the *Caterpillar*

case and has reasserted the opinion that this Court previously vacated. Also, the Appeals Court has barred this lawsuit against the Chickasaw Nation on a strict sovereign immunity theory that has been rejected by this Court and the Supreme Court of the State of Oklahoma. Because the Tenth Circuit has decided a federal question in conflict with applicable decisions of this Court, review by this Court is urgently required.

I. THE DECISION BELOW IMPROPERLY AFFIRMED REMOVAL JURISDICTION IN THE FEDERAL COURT, OF A CLAIM ARISING UNDER STATE LAW.

After instructions to reconsider this case in light of *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987) the lower court concluded that the State's complaint constituted an effort to avoid the sovereign immunity of the Tribe which is an inherent, although unstated, federal question within the pleading and therefore *Caterpillar* is inapposite and removal was proper. However, *Caterpillar* is controlling authority for removal jurisdiction in federal courts and the Tenth Circuit improperly disregarded its application to this case.

The Appeals Court has seized upon the Tribes defense of sovereign immunity contained in its Motion to Dismiss in order to grant the Tribe's removal petition from state court. This method of gaining removal jurisdiction based on the defense to the State's complaint is contrary to this Court's holding in *Caterpillar*.

In this case, the Oklahoma Tax Commission seeks to enforce its sales tax and cigarette tax laws against the Tribe's business enterprise. The Petition filed in State District Court by the Tax Commission alleges that State laws are being violated and prays for the remedy provided by State law for those violations. The face of the State's Petition is absolutely void of any reliance on federal law, which is logical in view of the fact that federal law provides no remedy for the collection of a state's taxes. Since the only remedy available to the Tax Commission is provided by State law, this action could not have been originally brought in the Federal District Court.

In defense of the State's action, the Tribe motioned to dismiss based on sovereign immunity. It is upon this defense that the Tenth

Circuit predicated removal jurisdiction by reasoning that the State was required to somehow anticipate this defense and overcome it in the original pleading. The State's failure to address this defense rendered the petition "not well plead" and the Tribe was allowed to inject the defense as a jurisdictional basis for removal.

This novel method of gaining federal question jurisdiction is not allowed under the decisions of this Court which require that a federal question must be presented upon the face of the plaintiff's properly pleaded complaint before a case can be removed from state to federal court. It is only after the removal petition is properly granted that issues contained in a motion to dismiss in defending the lawsuit may be considered and litigated in the federal forum. In the *Caterpillar* case this Court held:

> [T]he presence of a federal question . . . in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court . . . But the defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in whch the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

This Court's recent holding in the *Caterpillar* case did not establish new theories of law but, rather, was based on previous Supreme Court precedent and federal law dating back to 1887. In the case of *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983), cited in *Caterpillar*, this Court held at 13-14:

> For appellant's first cause of action—to enforce its levy, under §18818—a straightforward application of the well-pleaded complaint rule precludes original

> federal-court jurisdiction. California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid claim for relief under state law . . . The well-pleaded complaint rule was framed to deal with precisely such a situation. As we discussed above, since 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

This Court went on to say that the party who brings a suit is master to decide what law he will rely upon but it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint. However, in cases involving state taxation, the Court has found that this is purely a state law matter and it is impossible to plead a federal question in this context.

The Court addressed the state taxation issue in *Gully v. First National Bank*, 299 U.S. 109 (1936). In this case the State of Mississippi sued a federally chartered bank in state court for collection of taxes. The Defendant removed the case to federal court where it was accepted based on federal question jurisdiction. The lower courts ruled upon the ground that the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute, and that by necessary implication a plaintiff counts upon the statute in suing for the tax. This Court held that the case was improperly removed from state court and ruled at 299 U.S. 112:

> To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.

> A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal . . . Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.

At 116 this Court concluded that:

> The federal nature of the right to be established is decisive—not the source of the authority to establish it. Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because it is prohibited thereby.

The rulings of this Court in the *Gully* case clearly set forth the uncompromising limitations that have been placed on federal court jurisdiction. It is conceded that a trial on the merits of this case would involve litigation of federal questions. However, not every question of federal law emerging in a suit is proof that a federal law is the *basis* of the suit. When a question of federal law lurks in the background of a lawsuit, as it does in this case, the dispute is so conjectural, and so far removed from plain necessity, that it is unavailing to extinguish the jurisdiction of the State Court.

The opinion in *Gully* explains that a mechanical application of the rules of removal jurisdiction will not always yield the proper result because, to define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. The search for causes could extend backward without end. But instead, there has been a selective process which picks the substantial causes

out of the web and lays the other ones aside. As in the problems of causation, so here in the search for the underlying law. To set bounds to this pursuit of the underlying law, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. In the case at bar, the decision below has stepped out of these boundaries and into the maze from which it now must be retrieved.

As a matter of federal law, this case clearly should be remanded to the District Court of Murray County, State of Oklahoma. Nothing in the State's original petition in State Court would allow removal jurisdiction and it is plain error for the Tenth Circuit to rule that removal was proper in light of this Court's ruling in the above cited cases.

II. THE DECISION BELOW IMPROPERLY DISMISSED THE STATE'S CASE BASED ON TRIBAL SOVEREIGN IMMUNITY

In this case, the State is attempting to enforce state sales tax and cigarette tax laws upon the Tribe's business enterprise. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, and *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 are cases which stand for the holding that the State has the right to require the Tribe to collect these taxes on the State's behalf. However, this goes to the merits of the case which have not been heard because the lower courts have found a way to avoid this result by a procedural ruling which holds that a state may not sue an Indian tribe under a strict sovereign immunity theory. Under the lower court's theory, a state may have the right to have its taxes collected, but if a tribe disregards this right and positively refuses to collect and remit the State's taxes, the state is barred from seeking a remedy to enforce that right. The state would submit that a right without a remedy is certainly no right at all. If this is the law, the trilogy of cases cited above are merely an idealistic policy statement rather than a determination of law.

The Tenth Circuit reasserted its prior ruling in their recent opinion at A-1, and cited its vacated opinion located in the Appendix at A-9, for the holding that the Tribe is immune from suit, thus barring the

State's claim. The Tenth Circuit's authority is a citation to *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 for the ruling at A-15 that:

> The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.
>
> * * *
>
> Although the sovereign immunity enjoyed by tribes is not absolute, we may infer state authority only "where Congress has expressly provided that state laws shall apply." *McClanahan, 411 U.S. at 171*. Hence, tribal sovereign immunity prohibits suit *against* Indian nations without Congressional authorization.

Safe in the knowledge that Congress had not authorized this lawsuit, the Tenth Circuit affirmed the dismissal of the State's action. However, the Tenth Circuit's reliance on *McClanahan* was misplaced.

This Court closely tailored the decision in *McClanahan* to the specific facts of that case. At 411 U.S. 167-168 this Court stated:

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See e.g., *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. See, e.g. *Thomas v. Gay*, 169 U.S. 264 (1898) . . . Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands.

> See e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Rather, this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation.

The *McClanahan* case also speaks directly to the issue of tribal sovereignty in Oklahoma and cities the *Oklahoma Tax Commission* case with approval at *411 U.S. 171*.

> As noted above, the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See e.g. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).
>
> * * *
>
> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).
>
> * * *
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.

The crucial language in the McClanahan decision comes at p. 181 where this Court ultimately rules that:

> This Court has therefore held that "the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217 (1959) at 220.

The decision below is therefore in conflict with this Court's opinion in *McClanahan*, in that the Indian sovereignty doctrine is not a bar to this suit. However, the decision below is in need of review

not only for its error, but because it has caused a split of opinion between the Tenth Circuit and the Supreme Court of the State of Oklahoma. The Oklahoma Supreme Court has ruled on this issue in *State Ex Rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985). In *Seneca-Cayuga*, the State Supreme Court also relied on *McClanahan* for fits holding at 711 P.2d 84:

> Although some adherence to the immunity doctrine continues, the strict territorial approach applied earlier has largely given way to two other tests developed by the United States Supreme Court since 1959 for assessment of Indian Country's amenability to state law: infringement upon tribal self-government and pre-emption by federal action.
>
> The infringement test allows state jurisdiction in cases not involving tribal self-government. Pre-emption analysis recognizes inherent Indian sovereignty as " backdrop against which the applicable treaties and federal statutes must be read," but focuses on whether the state has been granted jurisdiction by the federal government.

The State Supreme Court concluded that tribal sovereignty is not a bar to state jurisdiction in Oklahoma, although the State must meet the modern tests for measuring infringement upon tribal self-government and federal pre-emption.

The Tenth Circuit opinion below has selectively applied language in cases pertaining to reservation states to conclude that the State of Oklahoma is wholly without jurisdiction to even bring suit against an Indian tribe to litigate the issue of taxes. However, this Court has determined in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 at 602-603, that the theory that Indian tribes are separate political entities with all the rights of independent status is a condition which has not existed for many years in the State of Oklahoma. Also, the Court found that the underlying principles on which the reservation decisions are based do not fit the situation of the Oklahoma Indians. This Court recognized then that Oklahoma was distinguishable from the reservation states because Oklahoma is an

assimilated State and for all practical purposes, Indian citizens of this State are indistinguishable from all other citizens.[1]

The assimilation of the Indians of Oklahoma into the general community of this State has been recognized by all three branches of federal government and this State has been afforded separate treatment for that reason.[2] Although Oklahoma has a long and proud tradition of Indian heritage, and an estimated one-third of all Indians in the United States live in Oklahoma, the non-Indian population is so much greater and non-Indian culture has been disseminated to such an

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1 *Oklahoma Tax Commission v. United States* is still the law in Oklahoma as it has not only been cited with approval in *McClanahan* but was followed in *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948) and was strongly embraced in *United States v. Mason*, 412 U.S. 391 (1973).

2 Besides the decision of this Court already mentioned, the case of *Woodward v. DeGraffenreid*, 238 U.S. 284 (1915) offers an extensive discussion of the effects of the Curtis Act and the Dawes Commission upon Indians in Oklahoma and the organization of the territory into the State of Oklahoma. Included in this decision is the citation to the Dawes Commission's yearly reports to Congress and Congressional Committee reports detailing the legislative history of Congressional action culminating in Oklahoma statehood. The legislative history of Congressional Acts which opened the territories for settlement, disestablished the reservations, and organized the territory for statehood is a point that needs to be more fully briefed. However, as pointed out in the State's previous petition to this Court, Case No. 87-635, note 5, Congress recognizes that Oklahoma is not a reservation state.

In the executive branch, the U.S. Department of Commerce, in its handbook entitled *Federal and State Indian Reservations and Indian Trust Areas* (1973), C 1.8/3: In2), made the following note in the Oklahoma section of the handbook:

> The Indian land status in Oklahoma is unique in comparison with Indian lands elsewhere. Because of special laws related to Indian owned land in Oklahoma, there are no reservations in that state, insofar as the term generally applies to Indian lands in other parts of the United States. The members of the 27 tribes mentioned herein have been assimilated to such a degree that any statement made in reference to tribal economy, transportation, climate, community facilities, and recreation would reflect the status of the non-Indian community. Therefore, these headings have been omitted from the Oklahoma portion of this handbook.

extent, that the Indian character of the former reservation lands in Oklahoma has been extinguished.[3] The traditional solicitude of the Indian tribes no longer exists in Oklahoma. The affairs of the tribe necessarily touch and concern the entire community since the two are inseparable. Therefore, State jurisdiction should obtain or else no satisfactory administration of any law could be maintained in any practical application.

The particular circumstances of the formation of Oklahoma into a state, including the legendary land runs which brought floods of white settlers to the state and the forced allotment of all reservations, inter alia, underscore the reasoning behind this Court's opinion in *Oklahoma Tax Commission v. United States*, supra, where the State's tax collection efforts were enforced. The Court held at 319 U.S. 608:

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3 Population statistics regarding Indians in Oklahoma bear out this observation. The U.S. Department of Commerce, Bureau of the Census, compiled results of the 1980 Dicennial Census in the handbook, *American Indians, Eskimos, and Aluets on Identified Reservations and in the Historic Areas of Oklahoma (Excluding Urbanized Areas) 1980 Census of Population.* The Bureau noted at page VIII of the publication:

> The historic areas of Oklahoma (excluding urbanized areas) consist of the former reservations which had legally established boundaries during the period 1900-1907. These reservations were dissolved during the two-to-three year period preceding the statehood of Oklahoma in 1907.

It has been estimated that the Indian population in Oklahoma is approximately 175,000. In the publication cited above, the Indian population in the Historic Areas of Oklahoma (excluding urbanized area), reported in table 13, pg. 99, totals 113,367 of which 57,837 are enrolled tribal members. This can be compared with the total population in Oklahoma of 3,301,000 from the *Statistical Abstract of the United States*, 1987. These statistics demonstrate the predominance of the non-Indian society within the state and the consequent assimilation of the Indians into that society. This Court has used indicators such as the tenor of legislative reports, surrounding circumstances and demographics to sort out state and tribal jurisdictional problems in *Solem v. Bartlett*, 465 U.S. 463 (1984). These jurisdictional problems are quite complex in Oklahoma due to the lack of any reservation boundry and the checkerboard of isolated tracts of Indian allotments across the State. See also the map of *Indian Lands and Related Facilities* as of 1971, compiled by the Bureau of Indian Affairs in cooperation with the Geological Survey, U.S. Department of Interior which identifies the "former reservations in Oklahoma."

Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a state, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the state. If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay. "Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?" *The Cherokee Tobacco*, supra, 11 Wall. page 621, 20 L. Ed. 227. Recog-nizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, permitted States to impose income taxes upon government employees and *Helvering v. Gerhardt*, 304 U.S. 405, permitted the federal government to impose taxes on state employees. *O'Malley v. Woodrough*, 307 U.S. 277, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering v. Mountain Producers Oil Corp.*, supra, repudiated former

decisions seriously limiting state and federal power to tax. See, also, *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, and *James v. Dravo Contracting Co.*, 302 U.S. 134. The trend of these cases should not now be reversed.

The situation that exists in Oklahoma which spawned this litigation is that, recently, some of the forty different Indian Tribes in Oklahoma have separately embarked on a program of aggressively entering the economic marketplace of the State in direct competition with private businesses. To this end, the various tribes, like the Chickasaws in this case, have purchased business properties in the commercial centers in many Oklahoms towns. These properties are then placed in trust with the United States under federal statutes and the tribes then proclaim that no State law applies to their business enterprise by force of federal law, whereupon the tribe opens for business, sans state taxes or regulation, with a significant economic advantage, albeit an artificial one, over neighboring businesses. This tribal activity, even in Indian Country within Oklahoma, has taken on a form that necessarily affects non-Indians and Indians alike, and has exerted a trenchant effect upon the general economic community of the State. The Tribe avails itself of the machinery furnished by the State and there is no reason why it should not contribute in the same proportion that every other business contributes for the privileges that it uses. It has no better or other right to use them than anyone else. "The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal", Justice Holmes dissent in *Panhandle Oil Co. v. Mississippi ex rel, Knox*, 277 U.S. 218 at 224.

Finally, the State urges, as it did in its first petition for cert. in this case, that this case falls within the precedent set by this Court in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) where this Court held that the Mescalero Apache Tribe's business was subject ot state taxation at 411 U.S. 148:

> Tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation . . . Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondescriminatory state law otherwise applicable to all citizens of the State.

The Tenth Circuit's decision has foreclosed the State's ability to rely on this Court's opinions, which have previously determined that the State has the right to collect these taxes, by preventing the State's suit. The tribal sovereign immunity doctrine is not a bar to the State's suit under the applicable decisions of this Court and the Tenth Circuit's application of that doctrine was incorrect in this case. It is therefore essential that this Court review the decision below to protect the State's rights.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, Plaintiff-Appellant, v. JAN GRAHAM and CHICKASAW NATION, by and through OVERTON JAMES, Governor of the Chickasaw Nation, Defendants-Appellees.	)	No. 86-1655

Appeal from the United States District Court
For the Eastern District of Oklahoma
D.C. No. 85-663-C

Robert C. Jenkins (J. Lawrence Blankenship with him on the briefs), Oklahoma City, Oklahoma, for Plaintiff-Appellant.

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John G. Ghostbear, Tulsa, Oklahoma, on the brief on Amicus Curiae Choctow Nation of Oklahoma, for Defendants-Appellees.

Before SEYMOUR, MOORE, and TACHA, Circuit Judges.

MOORE, Circuit Judge.

This case is again before us following remand for reconsideration in light of *Caterpillar Inc. v. Williams*, _____ U.S.____, 107 S. Ct. 2425 (1987). The question presented on remand is whether the action filed by the State of Oklahoma (State) in state court to collect taxes from the Chickasaw Nation was properly removed. We conclude that the State's complaint constituted an effort to avoid the sovereign immunity of the Chickasaw Nation because a federal question allowing removal is inherent in the pleading. We are, thus, convinced *Caterpillar* is inapposite, and we adhere to our previous disposition that removal was proper, and dismissal was warranted.[1]

In *Caterpillar*, the Supreme Court held that the defendant cannot remove a claim for breach of individual employment contracts by interjecting the collective bargaining agreement in its answer to provoke federal removal jurisdiction. The *Caterpillar* plaintiffs had sued for breach of state-law contract rights which, the Court decided, were founded on individual agreements, not "substantially dependent on analysis of a collective-bargaining agreement." *Id.* at 2431. The defendant justified removal alleging facts not present in the plaintiffs' complaint to implicate federal substantive labor law. However, the Court held the state breach of contract action could not be transformed in § 301 LMRA litigation solely upon the basis of the federal defense raised;[2] and

> [o]nly state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

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1 *State of Okla. ex rel. Oklahoma Tax Comm'n v. Graham*, 822 F.2d 951 (10th Cir. 1987).

2 The Court recognized, "It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under § 301. As masters of the complaint, however, they chose not to do so." *Caterpillar*, 107 S. Ct. at 2431.

Id. at 2429 (footnotes and citations omitted). Because the *Caterpillar* complaint on its face was grounded on state law, raised no federal issues, and no other basis for federal jurisdiction was present when the suit was filed, the Court concluded removal was improper.

In our case, the State's complaint facially states a claim grounded on state law. Indeed, nothing within the *literal* language of the pleading even suggests implication of a federal question. Yet, such a question is inherent within the complaint because of the parties subject to the action.

The named defendant is the Chickasaw Nation, a sovereign entity whose status is subject to and limited by congressional power alone. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Thus, as we noted in our prior opinion, absent its consent, the Chickasaw Nation is subject to suit only under conditions prescribed by Congress. *State of Okla. ex rel. Oklahoma Tax Comm's v. Graham*, 822 F.2d 951, 956 (10th Cir. 1987).

The State attempted to "well-plead" its complaint by invoking only state revenue laws and thereby avoid the Chickasaw Nation's sovereign status. However, the complaint is not well-pleaded and consequently falls outside the boundaries *Caterpillarr* set.

In order to well-plead an action in state court to impose state tax liability upon certain tribal commercial affairs transacted on the territory of the Chickasaw Nation, the State must plead either the tribe's consent to suit or its valid waiver. *See Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977). The State alleges neither, and the absence of this essential element of subject matter jurisdiction is the essence of the federal question inherent in the State's action.

On remand, we asked the parties to address the applicability of *Department of Revenue of Iowa v. Investment Finance Management Co.*, 831 F.2d 790 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3734 (U.S. Apr. 25, 1988) (No.87-1480). In that case, the Eighth Circuit dealt with a removal predicated upn federal preemption. The State argues *Investment Finance* is inapplicable because "the subject of [the instant] lawsuit does not come within the exclusive province of

the Federal Government," and "the State of Oklahoma has jurisdiction over the parties and the subject matter." These arguments miss the point of concern.

The pertinent issue from *Investment Finance* is whether a removed action unenforceable against an Indian tribe or its agent should be remanded or dismissed. The Eighth Circuit held that remand is proper, but *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922), upon which *Investment Finance* is based, portends a different result.

Based on the rules of removal jurisdiction in force at the time the complaint was filed in state court, the Eighth Circuit decided the federal court to which the action was removed acquired only the jurisdiction of the state court. Thus, if the state court lacked jurisdiction over a case because of federal preemption, the federal court also lacked jurisdiction.[3] The predicate for this holding was established by Justice Brandeis in *Lambert Run* when he held "[i]f the state court lacks jurisdiction, . . . the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run*, 258 U.S. at 382. Yet, contrary to the conclusion reached in *Investment Finance*, the *Lambert Run* court held the district court must dismiss the case without prejudice when it perceives the state court lacked subject matter jurisdiction. We conclude that is the proper disposition of this matter as well. Because we believe sovereign immunity protects the Chickasaw Nation against the State's action, we would follow the *Lambert Run* analysis to its final conclusion. Accordingly, the judgment of the District Court of the Eastern District of Oklahoma dismissing this action is **AFFIRMED.**

No. 86-1655, State of Oklahoma ex rel. Oklahoma Tax Commission v. Jan Graham and Chickasaw Nation

TACHA, Circuit Judge, dissenting.

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3 Although this derivative jurisdiction rule was abolished by 28 U.S.C. § 1441 (1986), the Eighth Circuit held the amendment inapplicable to the case.

Again I must respectfully dissent. The decision of the Supreme Court in *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425 (1987), reinforces the view expressed in my previous dissent, 822 F.2d 951, 957-60 (1987).

In *Caterpillar*, the Supreme Court makes clear that complete preemption does not provide a basis for removal from state to federal court unless the plaintiff's claims fall within the scope of the preempted field. In *Caterpillar*, the preemption question involved § 301 of the Labor Management Relations Act. It is well established that § 301completely preempts the field of private rights arising out of collective bargaining agreements, so as to provide a basis for removal of cases purportedly relying on state law but in fact stating claims under collective bargaining agreements. *Caterpillar*, 107 S. Ct. at 2430; *Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists*, 390 U.S. 557, 559-60 (1968); *see also Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 23-24 (1983). In *Caterpillar*, the Court decided that plaintiffs' claims for breach of individual employment contracts were not within the scope of the field preempted by § 301 and therefore the defendants could not remove the action to federal court.

In particular, the final argument raised by the defendants in *Caterpillar* to justify removal is precisely analogous to the argument for removal in the present case. This argument was rejected by the Supreme Court, and it should be rejected here also. In *Caterpillar*, the defendant argued that § 301 preempts a state claim even when the defendant raises only a defense based on a collective bargaining agreement. The defendant reasoned that, because interpretation of the agreement involves an area of federal law which preempts state law, if the defendant's interpretation is valid, the state claims do not survive and removal is appropriate. That is exactly the situation presented to this court. The defendant has asserted the defense of sovereign immunity. It is undisputed that federal law completely preempts this field. Thus, to apply this defense, a court must necessarily look to federal law. However, the interjection of such a defense does not provide a basis for removal jurisdiction. As the Supreme Court stated in *Caterpillar*:

> It is true that when a defense to a state claim is

> based on the terms of a collective-bargaining agreement [sovereign immunity in the pressent case], the state court will have to interpret that agreement [federal law regarding sovereign immunity] to decide whether the state claim survives. But the presence of a federal question, even a § 301 question [question of sovereign immunity], in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint . . . .

107 S. Ct. at 2433.

The majority opinion does not persuade me that sovereign immunity operates other than as a defense. The majority relies on *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), and, in its previous opinion, relied on *Ramey Constr. Co. V. Apache Tribe*, 673 F.2d 315 (10th Cir. 1982), for the proposition that a plaintiff must affirmatively plead either consent or waiver of sovereign immunity to state a cause of action against an Indian tribe. The majority seems to be confusing a requirement for prevailing on the merits with a requirement for stating a cause of action. While the cases the majority relies on make clear that the plaintiff has the burden of demonstrating consent or waiver when the defense of sovereign immunity is raised, they contain no suggestion that allegations regarding consent or waiver constitute part of the cause of action and must appear in the plaintiff's complaint.

Furthermore, in analogous situations where the defendant claims immunity and the complaint does not present a federal question, it is a federal statute that provides authority for the federal courts to take jurisdiction. *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983) (28 U.S.C. §1330 makes an exception to sovereign immunity part of the plaintiff's cause of action against a foreign sovereign); *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (28 U.S.C. § 1442 allows removal of actions brought in state court against federal officials acting in their official capacity). No such statute covers the present situation.

The majority notes that "the Chickasaw nation is subject to suit only under conditions prescribed by Congress," and suggests that this necessary reliance on federal authority allows removal to federal court. Majority opinion at 3-4. The Supreme Court addressed and rejected precisely this argument in *Gully v. First Nat's Bank*, 299 U.S. 109 (1936). In *Gully*, the state of Mississippi filed suit in state court to collect state taxes from a national bank. The district court allowed removal because the state must rely on a federal statute for the power to tax a national bank. In its opinion, the Supreme Court stated:

> Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. It must also be consistent with the Constitution of the United States. If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

Id. at 115 (emphasis original) (citations omitted).

After reconsidering the present case in light of the Supreme Court's decision in *Caterpillar*, I am firmly convinced that this action was improperly removed to federal court. I would remand the case to state court. Because I would remand the case, I express no opinion on the applicability of *Department of Revenue of Iowa v. Investment Finance Management Co.*, 831 F.2d 790 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3734 (U.S. Apr. 25, 1988) (No. 87-1480).

APPENDIX B

SUPREME COURT OF THE UNITED STATES

NO. 87-635

OKLAHOMA TAX COMMISSION

Petitioner

v.

JAN GRAHAM, *et al.*

ORDER

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Caterpillar Inc. v. Williams*, 482 U.S. ___ (1987).

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION,	)	
Plaintiff-Appellant,	)	
v.	)	No. 86-1655
JAN GRAHAM AND CHICKASAW NATION, by and through OVERTON JAMES, Governor of the Chickasaw Nation,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
D.c. No. 85-663-C

Robert C. Jenkins (J. Lawrence Blankenship with him on the briefs), Oklahoma City, Oklahoma, For Appellant.

Bob Rabon of Kile and Rabon, Hugo, Oklahoma, for Appellees.

Before SEYMOUR, MOORE, and TACHA, Circuit Judges.

MOORE, Circuit Judge.

The State of Oklahoma ex rel. Oklahoma Tax Commission (State or appellant) appeals the district court's denial of its motion to remand and subsequent granting of the motion to dismiss filed by defendants Jan Graham and the Chickasaw Nation (Chickasaw Nation collectively or the Tribe). In its first order, the United States District Court for the Eastern District of Oklahoma held that removal was proper because the Constitution vests the Federal Government with exclusive authority over Indian tribes which is not limited or prohibited by 28 U.S.C. § 1343, the Tax Injunction Act. The district court, in a second order, then dismissed the State's action on the basis of the Chickasaw Natin's sovereign immunity from unconsented suit. The State now urges removal was improper because the action was based on state law alone as revealed plainly on the face of its complaint. alternatively, if removal is affirmed, the State argues that sovereign immunity cannot bar a state's legitimate power to levy and collect taxes. We disagree with both contentions and affirm the orders of the district court.

I

The Chickasaw Nation, one of the Five Civilized Tribes early removed to Indian Territory, is federally recognized Indian tribe which ownsd and operates the Chickasaw Motor Inn (the motel) in Sulfur, Oklahoma. The motel was purchased by the Chickasaw Nation as part of a tribal economic development project.. The tribal legislature authorized the operation of a tobcco shop and bingo game at the motel. Jan Graham, an employee of the Chickasaw Nation, manages the motel, the tobacco shop, and the game.

The State filed its complaint in the District Court of Murray County, Oklahoma, alleging that large quantities of cigarettes not bearing state excise and tax stamps were sold at retail to the general public from the motel. The absence of these tax stamps as well as the Chickasaw Nation's failure to file reports of its sales allegeably violated 68 Okla. Stat. §§ 306, 312, 316, 1354, 1361, and 1362. The State surther alleged that State sales taxes had not been paid on gross receipts from the operation of the bingo game at the motel, and the required reports had not been filed. The State sought an order permanently enjoining and restraining the Chickasaw Nation from conducting these activities and all business at the motel until all taxes, penalties, and interest were paid in full. The state court immediately

granted a temporary restraining order to enjoin the Chickasaw Nation from selling unstamped cigarettes and operating the bingo games.

Subsequently, the Chickasaw Nation removed the action to the United States District Court for the Eastern District of Oklahoma. The State moved to remand the action. Citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), and *Moe v. Confederated Salish & Kootenia Tribes of Flathead Reservation*, 425 U.S. 463 (1976), the district court denied the State's motion. The Chickasaw Nation then moved to dismiss the action pursuant to Fed. R. Civ.P. 12(b) for lack of subject matter jurisdiction. Granting the Tribes's motion, the district court noted that although neither this court nor the United States Supreme Court had laid a clear precedent for the determination of whether the Tribe's sovereign immunity from unconsented suits barred the present action, federal case law, particularly *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Chemehuevi Indian Tribe v. Claifornia State Bd. of Equalization*, 757 F.2d 1047 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9 (1985), dictated that the doctrine of sovereign immunity bars suit against the Tribe.

We agree with the conclusion reached by the trial court, but we emphasize the issues are subject of two separate inquiries. First, we must determine whether removal jurisdiction was present. Second, if removal is proper, we must determine whether substantive jurisdiction exists.

II.

A.

The State urges us to scrutinize the face of its complaint and hold that no federal question is present to permit removal. Bisecting this argument, the State contends, first, that the action involves solely the interpretation of state tax and revenue laws and, second, that removal is prohibited by 28 U.S.C. § 1341, the Tax Injunction Act.

We are unswayed by either assertion, mindful instead that our inquiry into whether a federal court has removal jurisdiction and whether it may exercise its limited substantive jurisdiction is not perforce bounded by the face of a complaint. Indeed, when the state plaintiff couches his "necessarily federal cause of action solely in

state law terms . . . the federal removal court will look beyond the letter of the complaint to the substance of the claim in order to assert jurisdiction." 14A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3722, at 243 (1985).

The substance of the State's claim embraces the central jurisdictional issue we must decide in this appeal. Indeed, when we strip the State's complaint of its statutory baggage, we are left with an action in which the State is attempting to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe.

This recognition underscores the implicit federal question lodged in the State's complaint and focuses our inquiry. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328 (10th Cir. 1986)." "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 2402 (citations omitted). *See also Williams v. Lee*, 358 U.S. 217, 220 (1959). The corollary of this principle is clear. "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 172 (1977). Moreover, it must "*affirmatively appear []* that there has been a congressional or tribal waiver of immunity." *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 318 (10th Cir. 1982) (emphasis added); *see also Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F. 2d 668 (8th Cir. 1986). Thus, an alleged waiver or consent to suit is a necessary element of the *well-pleaded* complaint. *See also North Davis Bank v. First Nat's Bank of Layton*, 457 F.2d 820, 822 (10th Cir. 1972) (action necessarily presented threshold question of federal law); *Madsen v. Prudential Federal Savings & Loan Ass's*, 635 F.2d 797, 801 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981) (distinguishing *North Davis Bank*). Thus, removal jurisdiction as to our first inquiry was correctly asserted.

Furthermore, the State can direct us to no contrary precedent or principle to require remanding this action to the state court. The

State's citations to authority are limited and distinguishable. [1] In fact, appellant is unable to provide us with any authority in which a state, absent a tribe's valid waiver or consent to suit, has succeeded in retaining state court jurisdiction in circumstances similar to our case.

Nevertheless, during oral argument, the State refocused its arguments and cited *Francise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1 (1983), for the proposition that a federal defense will not deprive a state court of jurisdiction. Appellant contends *Franchise Tax* prohibits our going beyond the face of the complaint to fashion its cause of action to the Tribe's federal defense.

In *Franchise Tax*, the Court addressed the issue of whether a state's suit to collect state taxes against a welfare benefit trust is removable to a federal district court because of ERISA preemption of a state's power to levy on trust funds. The Supreme Court held that a suit filed by state tax authorities to enforce state levies against funds held in an ERISA employee benefit plan is neither a creature of ERISA nor a suit of which the federal courts would take jurisdiction because of a question of federal law. *Id.* at 28. The Court applied the well-pleaded complaint rule to circumscribe the presence of federal question jurisdiction in plaintiff's complaint and found that the ERISA defense did not completely preempt the state cause of action. Appellant urges the same analysis is appropriate here.

Franchise Tax Board does not defeat federal removal jurisdiction in this case because the defendants are asserting the absence of jurisdiction and not federal preemption. Tribal sovereign immunity is

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1 The State cites State of Okla. ex rel. David Moss, Dist. Attorney v. Muskogee (Creek) Nation, Nos. 86-1832, 86-1887 (N.D. Okla. filed June 4, 1986, cross appeal filed June 13, 1986). The specific issue in that appeal is whether the state may enforce its nuisance law to prohibit the operation of the tribe's bingo game. Finally, appellant cites Wisconsin Winnebago Indian Tribe, 603 F. Supp. 428 (W.D. Wis. 1985) (state civil forfeiture action to enforce state criminal statute is not removable). During oral argument, the State stressed that our decision in Crow v. Wyoming Timber Products Co., 424 F.2d 93 (10th Cir. 1970), resolves the removal issue. Crow addresses the derivative nature of removal jurisdiction and is helpful although not entirely dispositive of this appeal.

jurisdictional, *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982), and, as we shall discuss later, places a different spin upon our inquiry. At this juncture, however, we find that removal was proper because of the constitutional grant of federal jurisdictin over Indian affairs. 28 U.S.C. § 1331.

B.

This inital holding recognizes that when removal was effected automatically in this case, the federal district court instantly acquired the threshold jurisdiction to decide whether it had the power to exercise jurisdiction over the action., This "jurisdiction to determine jurisdiction": is an essential power, subject ot review of any court, particularly the federal courts of limited jurisdiction. *Land v. Dollar*, 330 U.D. 731, 739 (1947); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). For this reason, upon removal, the federal district court acquired the same threshold jurisdiction that was vested in the state court as well. This jurisdiction to determine jurisdiction is not defeated by a subsequent determination that a court does not have subject matter jurisdiction over the issures in controversy.[2]

C.

The State's second argument to defeat removal jurisdiction ignores established precedent. The Tax Injunction Act, 28 U.S.C. § 1341, does not mandate state court jurisdiction. *Moe v. Confederated Salish & Kootenia Tribes*, 425 U.S. at 463, laid this issue to rest upon analyzing the origin of § 1341 and its long-accepted applicability to the United States. *Moe* settled that "[s]ince the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, . . . The Tribe is not barred from doing so here." Id. at 474 (citation omitted). Section 1341 does not prohibit the Chickasaw Nation's removal of this action.

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2 This concept unites our threshold jurisdiction inquiry with the derivative nature of removal jurisdiction. *Minnesota v. United States*, 305 U.S. 382 (1939), *Goodrich v. Burlington Northern R.R.*, 701 F.2d 129, 130 (10th Cir. 1983).

III.

Having concluded removal was proper, we turn to the State's contention that the district court erred in dismissing the suit against the Tribe and Jan Graham, individually, on the basis of tribal sovereign immunity. Support for this argument is difficult to discern because the State relies on precedent in which the issue of sovereign immunity was not reaised[3] and because the State interweaves the merits of the action with the legal issue of dismissal. Nevertheless, the principles governing the resolution of this question are not new. On the contrary. "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168 (1973) *(citing Rice v. Olson*, 324 U.S. 786, 789 (1945).

The Court has consistently recognized that "Indian tribes retain attributes of sovereignty over both their members and their territory." *California v. Cabazon Band of Mission Indians*, ____U.S. ____, 107 S. Ct. 1083, 1087 (1987). This tribal sovereignty is historically recognized to have a unique and limited character. "It exists only at the sufferance of Congress." *United States v. Wheller*, 435 U.S.313, 323 (1978); serves to promote Indian self-government and economic self-sufficiency, *White Mountain Apache Tribe v. Bracher*, 448 U.S. 136 (1980); and represents an accomodation between valid though competing Indian and state interests, *Rice v. Rehner*, 463 U.S. 713, 719 (1983). Although the sovereign immunity enjoyed by tribes is not absolute, we may infer state authority only "where Congress has expressly provided that state laws shall apply." *McClanahan*, 411 U.S. at 171.

Hence, tribal sovereign immunity prohibits suit against Indian nations without Congressional authorization. This sovereign

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3 For example, the State cites *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (tribe brought protest of New Mexico use tax); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (actions were brought by the United States on behalf of the tribes); *Rice v. Rehner*, 463 U.S. 713 (1983) (federally licensed Indian trader sought declaratory judgment against state alcoholic beverage control board.

bingo games until payment of the amounts allegedly due. The suit would in immunity enjoyed by a tribe is "as though the immunity which was theirs as sovereigns passed to the United States for their benefit." *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940). Thus, before *any* court can acquire jurisdiction over a tribe, it must affirmatively appear that "there has been a congressional or tribal waiver of immunity." *Ramey Constru. Co. v. Apache Tribe*, 673 F.2d at 318. "The judicial doctrine of tirbal sovereign immunity has long protected Indian tribes from suit in state and federal courts." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984); *see also Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983).

There is no indication in the record on the motion to dismiss that an unequivocal waiver, *Santa Clara Pueble v. Martinez*, 436 U.S. at 58, or consent to suit was offered to permit the State to litigate this action. *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 (9th Cir. 1985), *rev'd in part*, 474 U.S. 9 (1985). (Like the United States, and Indian tribe can consent to suit, but 'such consent must be unequivocally indicated.' " (citations omitted). Moreover, we are directed to no authority, absent these conditions, to authorize the suit.[4] Instead, at this stage, resolution must be guided by the established tradition of that sovereign immunity inherent in the distinct status of the Chickasaw Nation. *Santa Clara Pueble v. Martinez*, 436 U.S. at 49; *Puyallup Tribe*, 433 U.S. at 165. Thus, the district court correctly dismissed the action as to the Chickasaw Nation.

The conclusion that the Tribe is immune from suit does not end our inquiry, however. The state contends that even if the suit against the Tribe is barred, tribal employee Jan Graham is still subject to suit under the doctrine announced in Tenneco Oil Co. V. Sac & Fox Tribe, 725 F.2d 572, 574 (10th Cir. 1984). We disagree.

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4 After the district court granted the motion to dismiss, the State sought reconsideration on the ground that in Chemehuevi was later reversed. In *Chemehuevi*, the Ninth Circuit affirmed the district court's dismissal of the state's counterclaim for back taxes against the Chemehuevi tribe. The Supreme Court reversed on other grounds, and the dismissal of the counterclaim was not disturbed by the Ninth Circuit when the case was remanded. *Chemehuevi*, 800 F.2d 1446 (9th Cir. 1986).

Tribunal officials "do not have the same immunity as the Tribe itself." *Kennerly*, 721 F.2d at 1259 (citing *Martinez*, 436 U.S. at 59). But tribal immunity " extends to tribal officials when acting in their official capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981). The state cannot avoid the doctrine of sovereign immunity by nominally suing a tribal officer when the suit in substance is against the sovereign. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949). The State does not contend that Graham was not acting in an official capacity or without authorization by the Tribe.

Nevertheless, in *Tenneco Oil* we recognized that "[w]hen the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." 725 F.2d 574, 576 (McKay J., concurring). The concurrence in *Tenneco Oil* noted that "[w]ere it not for such an allegation in this case, the sovereign immunity of the tribe would extend to its officers." *Id.* We thus must examine the State's petition and complaint to determine whether employee Graham is immune from suit.

Nowhere in the State's petition is there an allegation that defendant Graham acted outside of the amount of authority that the Tribe is capable of bestowing as a matter of federal or constitutional law. It is well-established that only the Federal Government can limit the scope of tribal sovereignty. The petition only alleges that defendants failed to comply with state law. Thus, the *Tenneco Oil* exception does not apply.

Additionally, the relief sought by the State would operate directly against the Tribe and thus the suit in substance is against it rather than Graham. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interface with the public adminsitration, . . . or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' "*Dugan v. Rank*, 372 U.S. 609, 620 (1963) (Citations omitted). The State seeks an accounting for "taxes, penalties, and interest" allegedly due, and seeks to enjoin the operation of the Chickasaw Nation's motel, cigarette sales, and

effect grant relief against the sovereign itself, "over which the court, in the absence of consent, has no jurisdiction." *Larson*, 337 U.S. at 688. Thus, the suit as to Graham is also barred. *Id.*

The judgment of the district court dismissing the suit is AFFIRMED.

No. 86-1655, State of Oklahoma ex rel. Oklahoma Tax Commission v. Jan Graham and Chickasaw Nation

TACHA, Circuit Judge, dissenting.

I respectfully dissent. This is not a case about the sovereign immunity of an Indian tribe. This is a case about *who decides* the sovereign immunity of an Indian tribe. In my opinion the majority has incorrectly concluded that a claim of sovereign immunity satisfies the removal jurisdiction requirements that a federal question appear in the plaintiff's well-pleaded complaint. I would find that the federal courts do not have jurisdiction and that this case should not have been removed from state court.

I.

In *Franchise Tax Board v. Construction Laborer's Vacation Trust*, 463 U.S. 1 (1983), the Supreme Court held that a suit filed in state court can be removed to federal court only if the suit could have been filed originally in federal court. "If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed." *Id.* at 8. Thus, we must decide whether the federal courts would have original jurisdiction over the state's tax suit against the tribe.

Federal question jurisdiction exists only if the plaintiff's well-pleaded complaint establishes that the case arises under federal law. *Id.* at 9-10; *see also Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1546 (1987). It is "settled law that a case may not be removed to federal court on the basis of a federal defense". *Franchise Tax Bd.*, 463 U.S. at 14. The *Franchise Tax Board* Court recognized that:

> The [well-pleaded complaint] rule . . . may produce awkward results, especially in cases in which neither the obligation created by state law nor the defendant's factual failure to comply are in dispute, and both parties admit that the only question for decision is raised by a federal . . . defense. Nevertheless, it has been correctly understood to apply in such situtations.

Id. at 12 (footnote omitted)

It is not disputed that the face of the state's complaint in this case raises only state tax questions. The majority, however, finds that the state's attempt "to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe . . . underscores the implicit federal question lodged in the state's complaint. "Maj. op at 5.I disagree. This is not a case in which the plaintiff has couched a "necessarily federal cause of action solely in state law terms." 14A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procdures* § 3722 (1985). There are no questions of federal law in the state's well-pleaded complaint.

"The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Indeed, the Supreme Court has adopted a *per se* rule precluding state taxation of Indian tribes and tribal members. *See California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1091 n.17 (1987). Congress, however, can authroize a state to tax an Indian tribe if the congressional intention to do so is unmistakenably clear. *Montana*, 471 U.S. at 765. Thus, the tribe argues that because it is necessary for the state to rely upon a grant of congressional authority to tax the tribe, the state has raised a federal question in its complaint.

Gully v. First Nat'l Bank, 229 U.S. 109 (1936), instructs otherwise. In *Gully*, the State of Mississippi filed suit in state court to collect state taxes from a national bank. The lower courts granted the bank's petition to remove the action to federal court because "the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute, and that by

necessary implication a plaintiff counts upon the statute in suing for the tax." *Id.* at 112 (citation omitted). The Supereme Court held that removal was improper. Justice Cardozo wrote:

> Not every question of federal law emerging in the suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. It must also be consistent with the Constitution of the United States. If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

Id. at 115 (emphasis original) (citations omitted)

Gully establishes that although a state must rely upon federal authorization to tax a particular institution, a suit to collect such taxes does not necessarily raise a federal question in the well-pleaded complaint. The majority attempts to distinguish that state tax action in this case from *Gully* by arguing that a waiver of tribal immunity is part of a well-pleaded complaint. Maj. op. at 5-6. The case relied upon by the majority, *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero*, 673 F.2d 315 (10th Cir. 1982), involved an action brought against an Indian tribe in *federal* court.[1]

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[1] *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986), another case cited by the majority, actually undermines the position that the presence of an Indian tribe as a defendant creates a federal question. In *Weeks*, a tribal housing authority was sued in federal court. The Eight Circuit held there was no federal question jurisdiction:

> [T]he fact that the Housing Authority is created by and operates on behalf of an Indian tribe is not alone sufficient to find the existence of a federal question. *See Martinez v. Southern Ute Tribe*, 249 F.2d 915, 917 (10th Cir. 1957), *cert. denied*, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958) (federal question jurisdiction does not exist merely because an Indian is a party or because the suit involves Indian property or contracts). Rather, the rights which *Weeks* seeks to enforce are based on its construction contract with the Housing Authority, interpretation of which is go-verned by local, not federal, law _ Because *Weeks* breach of contract claim does not require inter-pretation of the validity, construction or effect of federal law, no subject matter jurisidiction over the Housing Authority based on a federal question exists here.

Weeks, 797 F.2d at 672 (footnote omitted). Similarly, the state of Oklahoma's state tax claim does not require a determination of federal law.

There was no question of removal jurisdiction in *Ramey*. Instead, the only question was the sovereign immunity of the tribe. It is true that the tribe is immune from suit in any court unless it has waived its immunity. Such a waiver must be express and clear; it cannot be implied. *See, e.g., Jicarilla Apache Tribe v. Hodel*, No. 85-1712, slip op. at 6 (10th Cir. June 18, 1987). It is doubtful that "a tribe can waive its immunity to suit in a state or federal court without congressional authority." F. Cohen, *Handbook of Federal Indian Law* 325 (1982 ed.) But *Gully* makes clear that the need for federal authority to sue a party does not raise a federal question for the purposes of a well-pleaded complaint.

Ramey also acknowledged that "[t]he Indian tribes' sovereign immunity is co-extensive with that of the United States." 673 F.2d at 319-20. The determination of federal question removal jurisdiction thus should be the same in cases involving Indian tries and in cases involving the United States. While federal officials are allowed to remove all suits brought against them to federal court, the basis of removal in those instances is a separate statute rather than a pervasive

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[1] (continued from A-20)

federal question. 28 U.S.C. § 1442 allows for the removal of actions brought in state court against federal officials acting in their official capacity. The right to remove a case from state court in that instance is absolute; removal takes place even if the action could not have been brought originally in federal court. *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). The Congress found it necessary to enact a special removal statute authorizing federal court jurisdiction in all cases involving federal officials acting in their official capacitites implies that the *status* of a federal official is not in itself sufficient to create federal jurisdiction. *See also* 12 U.S.C. § 1819 (the Federal Deposit Insurance Corp. can remove suits brought against it in state court except in specified situations where the FDIC is the receiver of a state bank). There is no such statute conferring federal jurisdiciton in all cases in which an Indian tribe is a party.

Suits against foreign sovereigns are treated similarly to suits against federal officials. In *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), a Dutch corporation sued a Nigerian state bank in federal court for breach of contract. The bank moved to dismiss, arguing that the court lacked jurisidciton because of the state bank's sovereign status. The Court held that the Foreign Sovereign Immunities Act, 28 U.S.C. 6 1330, expressly provided for suits against foreign sovereigns in federal court. *Id.* at 489-91. The Court also observed:

> Prior to passage of the Foreign Sovereign Immunities Act, which Congress clearly intended to govern all actions against foreign sovereigns, state courts on occasion had exercised jurisdiction over suits between foreign plaintiffs and foreign sovereigns . . . Congress did not prohibit such actions when it enacted the Foreign Sovereign Immunities Act, but sought to ensure that any action that might be brought against a foreign sovereign in state court could also be brought in or removed to federal court.

Id. at 491 n. 16 (citations omitted). Congress has not enacted an equivalent provision that would allow the removal of actions brought aginst an Indian tribe in state court.

II.

Tribal sovereign immunity is jurisdictional. *Raney*, 673 F.2d at 318; *see also* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982) ("The judicial doctrine of tribal sovereign immunity traditionally has protected Indian tribes from suit in state and federal courts." (footnotes omitted). The question here is *which court* decides the question of sovereign immunity. *Either* the state court or the federal court must have jurisdiction to decide whether sovereign immunity applies in this case. *See, e.g., Land v. Dollar*, 330 U.S. 731, 739 (1947) (a court has jurisdiction to determine if it has jurisdiction). As the majority properly recognizes, the federal district court did not acquire the threshold jurisdiciton to determine the sovereign immunity of the Chickasaw nation until the court found that removal from state court was proper. Maj. op. at 4, 8. For the reasons I have described, I conclude that removal was improper in this case. Therefore, I would not reach the question of the sovereign immunity of the tribe.

The implication of the majority's position is that federal court removal jurisidiction exists whenever "the defendants are asserting the absence of jurisidiciton." Maj. op. at 7. A challenge to state court jurisdiciton cannot be sufficient to invoke removal jurisdiciton. A federal court obtains removal jurisdiction only when it would have original jurisdiction. Federal law may well determine the result in a state court case, but showing that a federal question very likely will be dispositive of a case falls short of a showing that the plaintiff's original cause of action arises under federal law.

III.

This court must afford "proper respect for the ability of state courts to resolve federal questions presented in state court litigation." *Pennzoil Co. v. Texaco, Inc.* 107 S.Ct. 1519, 1527 (1987). The state court is constitutionally obligated to follow the commands of federal law regarding Indian tribal sovereignty. Should the state court fail to do so, the Supreme Court can review that decision on appeal. *See Franchise Tax Bd.*, 463 U.S. at 12 n.12.

Because the State of Oklahoma's complaint in this case does not raise a federal question, there would be no original jurisdiction in the federal courts, and thus there is no removal jurisdiciton. I would hold that this action was improperly removed to federal court and that it should now be remanded to state court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex. rel., OKLAHOMA TAX COMMISSION Plaintiff, v. JAN GRAHAM and CHICKASAW NATION, Defendants.	)	No. 85-663-C

ORDER

Now before the Court for its consideration is the motion of the plaintiff, Oklahoma Tax Commission, to remand the above styled and numbered case which was removed by defendants from the District Court of Murray County, Oklahoma on October 22, 1985.

Defendants removed the action asserting federal question jurisdiction under 28 U.S.C. § 1331. In its motion to remand plaintiff asserts, first, that the Court lacks subject matter jurisdiction since on the face of the petition only state statutory violations are raised; and second, that removal is prohibited under 28 U.S.C. § 1341, the Tax Injunction Act.

In *Montana v. Blackfeet Tribe of Indians*, 105 S.Ct. 2399 (1985) the court stated:

> The constitution vests the Federal Government with exclusive authority over relations with Indian tribes. (citations omitted). As a corollary of this authority, and in recognition of the sovereignty retained by Indian Tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory (citations omitted). *Blackfeet Tribe*, 105 S.Ct. at 2402.

It is apparent from reading the petition that the State of Oklahoma is attempting to enforce its revenue statutes against certain activities of a federally recognized Indian Tribe, the Chickasaw nation. This Court clearly has subject matter jurisdiciton over the controversy raised by the pleadings.

In *Moe v. Salish & Kootenai Tribe*, 425 U.S. 463 (1976), the court clearly stated 28 U.S.C. § 1341 does not bar federal courts from assuming original jurisdiction over civil actions involving Indian Tribes and a State seeking enforcement of its tax and revenue laws.

WHEREFORE, premises considered, it is the Order of the Court that the motion of the plaintiff, State of Oklahoma, ex rel. the Oklahoma Tax Commission, to remand to state court is denied.

IT IS SO ORDERED this 27th day of February, 1986.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex. rel., OKLAHOMA TAX COMMISSION Plaintiff, v. JAN GRAHAM and CHICKASAW NATION, Defendants.	)	No. 85-663-C

ORDER

Now before the Court for its consideration is the motion of the defendants, Jan Graham and Chickasaw Nation, to dismiss the action for the reason that the defendants are immune from unconsented litigation.

The defendant Chickasaw Nation owns the Chickasaw Motor Inn in Sulfur, Oklahoma. The motel is situated on trust lands, the title being vested in the United States in trust for the Tribe. The Chickasaw nation has a tobacco shop and conducts a small bingo game at the motel. The motel is managed by a tribal employee, the defendant Jan Graham. The Oklahoma Tax Commission brought this action against the Tribe and defendant Grham. The Tax Commission seeks to collect the tax on the revenues derived from operation of the motel, the sale of tobacco, and the bingo games; or enjoin the Tribe from continued operation of these activities.

In their motion to dismiss, defendants assert that an Indian tribe such as the Chickasaw Nation enjoys sovereign immunity from unconsented suit and this immunity extends to its officials and agents acting within the scope of tribal affairs. The Tribe cites *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in stating " the sovereign immunity of Indian Tribes is similar to the sovereign immunity of the United States neither can be sued without the consent of Congress." *supra* at 58.

In response, the plaintiff asserts that tribal sovereignty is limited in scope to matters wholly within tribal powers, and has no application in an action to enforce state tax laws. Plaintiff concedes that the tribe is immune from suit regarding any activity involving internal tribal self-government. However, the plaintiff contends that the immunity doctrine has no application to tribal conduct involving matters outside the Tribe's sovereign powers, e.g., the tribe's relationship or obligation to the state. Plaintiff thereafter cites authority on the merits of its lawsuit. At this stage of the litigation the Court is not reviewing the merits as to whether the State of Oklahoma may enforce its revenue laws against the Chickasaw Nation; but rather, the Court's scope of review under defendants' motion to dismiss is whether the parties are properly before the Court or whether the action is barred by the doctrine of tribal sovereign immunity. Therefore, plaintiff's recitation of authority on the merits of its action shall not be presently considered.

The Court is mindful that the Tenth Circuit and the united States Supreme Court has not laid clear precedent for this Court to follow in determination of this issue. Both parties have quoted selected portions of case law from various jurisdicitons in an effort to promote their respective positions.

In *State of Oklahoma v. Senaca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985), our state supreme court has clearly taken the position that tribal sovereign immunity does not act as a bar to state's suits against Indian tribes. The court applied a balancing test and weighed the issue in favor of state action. Albeit, the Oklahoma Supreme Court's analysis is interesting, this Court under federal jurisdiction must view the issue independently and apply the rules of law espoused by the United States Supreme Court or the Tenth Circuit.

In the absence of clear controlling precedent, a review of other federal circuit court's decisions on the issue is persuasive authority.

In *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984), the court held that the doctrine of tribal sovereign immunity precludes federal court jurisdiction over a claim for damages under the Indian Civil Rights Act by a non-Indian against an Indian Tribe. The Tenth Circuit applied *United States v. United Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), as the "long-standing rule that absent congressional authorization Indian tribes are exempt from suit under the doctrine of sovereign immunity." *White v. Pueblo*, *supra* at 1311.

In *Tenneco Oil v. Sac & Fox*, 725 F.2d 572 (10th Cir. 1984), the court acknowledged tribal immunity from unconsented suit, but held that tribal officials were not immune when the validity of a tribal ordinance as it applies to non-Indians (in this instance an oil company) is in question. The court held it had jurisdiciton to determine whether the tribal ordinances which had the effect of cancelling oil company's oil and gas leases were valid under federal law and applicable treaties. In the case currently before the Court, the issue raised is not whether a tribal ordinance is impermissibly being applied against and effecting non-Indians; but rather, the issue is whether a state statute can properly be applied against the Tribe when suit is initiated by the state against the Tribe. This precise issue was reviewed by the Ninth Circuit in *Chemehuevi Indian Tribe v. California Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985), wherein an Indian tribe brought suit challenging the validity of California's cigarette tax as applied to tobacco sold by the Tribe on the reservation to non-Indian purchasers. The Board filed a counterclaim against the Tribe for the amount of taxes allegedly owed. The Ninth Circuit disallowed the counterclaim under the doctrine of tribal sovereign immunity. The court opened:

> Because of its status as a sovereign entity, an Indian tribe is generally immune from unconsented suits. 'The common law immunity of [Indian tribes] is coextensive with that of the United States . . .' This immunity is rooted in the unique relationship between the United

> States government and the Indian tribes, whose sovereignty substantially predates the constitution. 757 F.2d at 1051 (citations omitted).

The court concluded that "like the United States, an Indian tribe can consent to suit, but such consent must be unequivocally indicated." *Supra* at 1053.

From analysis of federal case law, this Court concludes that under the present rulings of the courts and the dictum contained in Supreme Court decision, in particular *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), defendants' motion to dismiss premised on the doctrine of tribal sovereign immunity must be and hereby is sustained.

IT IS SO ORDERED this 27th day of February, 1986.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex. rel., OKLAHOMA TAX COMMISSION Plaintiff, v. JAN GRAHAM and CHICKASAW NATION, Defendants.	)	No. 85-663-C

ORDER

Now before the Court for its consideration is the motion of plaintiff for new trial or, in the alternative, motion to alter or amend judgment.

The Court has reviewed the Supreme Court's opinion in *California St. Bd. of Equalization v. Chemehuevi Indian Tribe*, 106 S.Ct. 289 (1985). The Court was aware of the opinion when the February 27, 1986, Order was entered, but through inadvertence, did not include its citation in the case history of the Ninth Circuit opinion which the Supreme Court reversed in part. Nowhere in the Supreme Court's opinion is the doctrine of tribal sovereign immunity, upon which this Court's order was based, explicitely modified. The bulk of the opinion interprets a California state statute in a particular context not before this Court. This area of the law remains higly unsettled. Barring a more explicit statement by the Tenth Circuit Court of Appeals or the United States Supreme Court. this Court is not persuaded that it should modify its prior ruling.

Accordingly, it is the Order of the Court that the motion of plaintiff for new trial, or in the alternative, motion to alter or amend judgment should be and hereby is denied in all respects.

IT IS SO ORDERED this 27th day of march, 1986.

APPENDIX G

25 U.S.C. § 465

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year; *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legisation, becomes law.

The unexpected balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

APPENDIX H

25 U.S.C. § 501

The Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: *Provided*, That such lands shall be agricultural an grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authroized to levy and collect a gross-production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is hereby authorized and directed to cause to be paid.

APPENDIX I

28 U.S.C. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

APPENDIX J

Title 68 Oklahoma Statutes § 232

When any reports required under any state tax law have not been filed or may be insufficient to furnish all the information required by the Tax Commission, or when the taxes imposed by any state tax law have not been paid, the Tax Commission may institute, in the name of the State of Oklahoma upon relation of the Tax Commission, any necessary action or proceedings to enjoin such person, firm, or corporation from continuing operations until such reports have been filed or taxes paid as required, and in all proper cases, including but not limited to cases in which the evidence establishes that a taxpayer has repeatedly failed to collect and remit sales or withholding taxes, injunction shall be issued without a bond being required from the state. After an action to enjoin the operation of any person, firm or corporation has been instituted by the Tax Commission a payout agreement under which the delinquent taxpayer is to make periodic payments toward the satisfaction of the tax debt may only be entered into upon the specific request or motion of the Tax Commission. Upon a proper showing in any such action that the claim of the state for taxes is in danger of being lost or rendered uncollectible by reason of the mismanagement, dissipation or concealment of the property by the taxpayer and a request is made for the appointment of a receiver to manage the property of the taxpayer, a receiver shall be appointed.

APPENDIX K

Title 68 Oklahoma Statutes § 302

There is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes within the State of Oklahoma a tax at the rate of four (4) mills per cigarette. No part of the cigarette tax receipts derived from said increase in the cigarette tax rate shall be used in determining the amount of cigarette tax collections to be paid into the State of Oklahoma building Bonds of 1961 Sinking Fund pursuant to the provisions of Se tions 57.31 through 57.43 of Title 62 of the Oklahoma Statutes.

The tax hereby levied shall be paid only once on any cigarettes sold, used, received, possessed, or consumed in this state. Such tax shall be evidenced by stamps which shall be furnished by and purchased from the Tax Commission or by an impression of such tax by the use of a metering device when authorized by the Tax Commission as provided for in this article, and said stamps or impression shall be securely affixed to one end of each package in which cigarettes are contained or from which consumed.

The impact of the tax levied by the provisions of this article is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state, and, when said tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user. In making a sale of cigarettes in this state, a wholesaler or jobber may separately state and show upon the invoice covering such sale the amount of tax paid on the cigarettes sold. The tax shall be evidenced by appropriate stamps attached to each package of cigarettes sold. Every retailer who makes sales of cigarettes within this state to persons for use or consumption shall separately show the amount of tax paid as evidenced by appropriate stamps on each package of cigarettes sold, and the tax shall be collected by the retailer from the user or consumer. The provisions of this section shall in no way affect the method of collection of such tax on cigarettes as now provided for by existing law. As to

cigarettes packed in quantities of less than ten, for distribution as samples, payment of the tax may be made to the Tax Commission in a lump sum without affixing stamps on such packages.

APPENDIX L

Title 68 Oklahoma Statutes § 302-1(a)

In addition to the tax levied in Section 302 of this title, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of this title, within the State of Oklahoma a tax at the rate of two and one-half (2 1/2) mills per cigarette. Such tax shall be evidenced by tax stamps as now provided for by law for other cigarette taxes, except that as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax levied in this section shall be computed and paid as provided for other cigarette taxes without affixing stamps on each such package.

APPENDIX M

Title 68 Oklahoma Statutes § 302-2(a)

In addition to the tax levied in Sections 302 and 302-1 of this title, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of this title, within the State of Oklahoma a tax at the rate of two and one-half (2 1/2) mills per cigarette. Such tax shall be evidenced by tax stamps as now provied for; however, as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax herein levied shall be computed and paid as provided for other cigarette taxes without affixing stamps on each such package.

APPENDIX N

Title 68 Oklahoma Statutes § 302-3(a)

In addition to the tax levied in Sections 302, 302-1 and 302-2 of Title 68 of the Oklahoma Statutes, except as otherwise provided in this section, there is hereby levied upon sale, use, gift, possession, or consumption of cigarettes, as defined in Sections301through 325 of Title 68 of the Oklahoma Statutes, within the State of oklahoma a tax at a rate reflecting the amount of the reduction of the federal cigarette tax levied pursuant to the provisions of subsection (b) of Section 5701 of the Internal Revenue Code, scheduled to be effective October 1, 1985. However, if the federal cigarette tax is increased subsequent to said reduction but prior to January 1, 1986, and said federal cigarette tax is increased by the amount of the reduction of said tax which was effective October 1, 1985, the provisions of this section shall cease to be effective. If the federal cigarette tax is increased subsequent to said reduction but prior to January 1, 1986, and said federal cigarette tax is increased by an amount less than the amount of the reduction of said tax which was effective October 1, 1985, the tax levied pursuant to the provisions of this section shall be at a rate reflecting the difference between the amount of the reduction of federal cigarette tax which was effective October 1, 1985, and the amount of the increase of said tax. Such tax shall be evidenced by tax stamps as now provided for by law for other cigarette taxes, except that as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax therein levied shall be computed and paid as provided for other cigarette taxes without affixing stamps on such package.

APPENDIX O

Title 68 Oklahoma Statutes § 1354

1. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code,[1] an excise tax of three and one-fourth percent (3 1/4%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property;

* * * * *

(E) Printing or printed matter of all types, kinds, or character and any service of printing or overprinting, including the copying of information by mimeograph, multigraph, or by otherwise duplicating written or printed matter in any manner, or the production of microfiche containing information or magnetic tapes furnished by customers;

* * * * *

(L) Tickets for admission to or voluntary contributions made to places of amusement, sports, entertainment, exhibition, display, or other recreational events or activities, including free or complimentary admissions which have a value equivalent to the charge that would have otherwise been made;

* * * * *

(M) Charges made for the privilege of entering or engaging in any kind of activity, such as tennis, racquetball, or handball, when spectators are charged no admission fee;

(2)

No. 88-266

In The

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA, ex rel,

Petitioner,

v.

JAN GRAHAM, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

To more accurately state the questions presented by the Circuit Court's decision than those set forth in the Petitioner's petition, Respondent suggests the following:

1. Was the Circuit Court correct in affirming an order of the district court dismissing this cause where it was determined that the state court from which it was removed did not have subject matter jurisdiction?

2. Do the state or federal courts have jurisdiction over Indian tribes absent a valid waiver of sovereign immunity from suit by either the tribe or Congress?

LIST OF PARTIES

The Petitioner is the State of Oklahoma ex.rel. Oklahoma Tax Commission. The respondents are the Chickasaw Nation and its employee, Jan Graham.

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No. 88-266

In The

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA, ex rel,

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JAN GRAHAM, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The respondents, Jan Graham and the Chickasaw Nation, defendants-appellees in the courts below, respectfully pray the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit docketed on August 12, 1988 be denied.

OPINIONS BELOW

The order and judgment of the Court of Appeals, which is reported at 846 F.2d 1258, appears in Appendix A to the Petitioner's petition. The order of this Court which is reported at 108 S.Ct. 481 appears in Appendix B to Petitioner's petition. The orders of the United States District Court for the Eastern District of Oklahoma appear in Appendices D, E, and F to Petitioner's petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1).

RESTATEMENT OF THE CASE

The Chickasaw Nation of Oklahoma is one of the Five Civilized Tribes and is federally recognized and protected. It was removed to South Central Indian Territory in the early nineteenth century. Sulphur, Oklahoma is located within the Tribe's original territory after removal and within its present day governmental territory according to its constitution. (App. A Preamble) The Tribe purchased the Chickasaw Motor Inn at Sulphur, Oklahoma in 1972 as a tribal economic development project. The title to the lands on which the motel is situated is vested in the United States of America in trust for the Tribe. Contrary to the State's assertation that the motel is "off-reservation", the United States District Court for the Eastern District of Oklahoma in another case involving

bingo gaming at the Chickasaw Motor Inn, has determined it to be situated on "Indian Country".[1] Pursuant to an Act of the Chickasaw Legislature (App. C), the Tribe conducts bingo games in a small meeting room at the motel which has a capacity of less than 100 persons. It also engages in the sales of concessions, including tobacco products. It does not collect or pay state sales taxes.

This action was commenced in the District Court of Murray County, Oklahoma on October 18, 1985. The prayer for relief in the State's complaint, sought to temporarily and permanently enjoin the Tribe from engaging in sales of tobacco, operating the bingo game and from conducting any business at the Chickasaw Motor Inn and Restaurant until complete and accurate reports are filed with, and all taxes paid to, the Oklahoma Tax Commission. The state district court immediately granted an ex parte temporary order enjoining the Chickasaw Nation and its motel manager, Jan Graham, from selling unstamped cigarettes and operating bingo games.

The Tribe and defendant Graham removed the action to the United States District Court for the Eastern District of Oklahoma. The State moved to remand to the state court contending that there was no federal question jurisdiction. Its motion was overruled. The Tribe and defendant Graham then moved to dismiss for lack of subject-

[1] *Chickasaw Nation, et al. v. The State of Oklahoma ex rel. Fred Collins, District Attorney for Murray County, Oklahoma, et al.*, Case No. 86-32-C. A copy of the Court's unpublished and unappealed from decision is attached as Appendix B.

matter jurisdiction on the basis of the Chickasaw Nation's sovereign immunity from unconsented suits and the absence of any allegations in the complaint of a valid waiver thereof. The Court sustained the motion to dismiss. The decision was affirmed by the United States Court of Appeals for the Tenth Circuit.

This Court then granted the State's Petition for Writ of Certiorari, vacated the judgment of the Appeals Court and remanded to the Tenth Circuit for further consideration in light of *Caterpillar, Inc. v. Williams*, 482 U.S. ___, 107 S. Ct. 2425 (1987).

On remand, the Tenth Circuit distinguished *Caterpillar* finding that the State's complaint was not "well-pleaded" as was the situation in *Caterpillar* and following the holding of this Court in *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922) reaffirmed that the case was properly dismissed rather than remanded to the state court.

REASONS FOR DENYING THE WRIT

The primary issue in this cause is whether the federal district court below should have remanded or dismissed after the case was removed from the state district court. On remand from this Court, the Circuit Court determined that the state court did not have subject matter jurisdiction because the State's complaint attempting to allege a state law cause of action against a federally recognized and protected Indian tribe failed to allege necessary jurisdictional facts i.e. Congressional or tribal waiver of sovereign immunity from unconsented suit. The Circuit Court

reasoned that when this case was removed derivative jurisdiction on removal was necessary and where the state court was without subject matter jurisdiction dismissal was proper. *Lambert Run Coal Co.* It followed well-established law and determined that dismissal rather than remand was required.

The State, without demonstrating any legal basis for it, urges this Court to find that the state court had jurisdiction notwithstanding the absence of tribal or congressional waiver of sovereign immunity. Alternately, the State admits on page 9 of its petition that "Safe in knowledge that Congress had not authorized this lawsuit, the Tenth Circuit affirmed the dismissal of the State's action. . . .". It urges this Court's review for the purpose of seeking to overturn a concept deeply rooted in this country's history and confirmed hundreds of times over the years by this Court. It is astoundingly asking this court to strip Indian tribes of their inherent sovereign immunity from unconsented suit in order that the States can enforce their laws over tribal activities on tribal lands. This proposition is advanced with complete disregard for the fact that constitutionally this is a decision for the Congress[2] and not this Court.

[2] Article I, Section 8, Cl. 3, United States Constitution.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DISTINGUISHED THIS CASE FROM *CATERPILLAR* AND APPLIED THIS COURT'S TEACHINGS AND MANDATE IN *LAMBERT RUN COAL CO.* IN REAFFIRMING THE TRIAL COURT'S REFUSAL TO REMAND

The State argues that its complaint well-pleads an action founded entirely on state law. It contends that the face of the complaint was "void of any reliance on federal law" and, therefore, there is no federal question jurisdiction. Respondents disagree. This is an action to impose a state tax on activities of an Indian tribe in Indian Country. The right to impose that tax must come from federal law. Likewise, the sovereign immunity from suit Indian tribes possess is inherently rooted in federal common law. Neither right is defined by state law as the State urges. These are areas that are completely preempted by federal law which this Court in *Caterpillar* recognized as an "independent corollary to the well-pleaded complaint rule". A similar question arose in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 685 (1974) where the Oneida Indian tribe brought suit in federal court to recover certain lands held by two counties in New York. The defendants challenged the Court's federal question jurisdiction under the "well-pleaded complaint" rule. This Court conceded that the complaint actually just alleged a state law cause of action for ejectment. However, the Court declined to apply the well-pleaded complaint rule because the case involved an Indian tribe claiming possessory rights to land which emanated from federal law. In Mr. Justice White's opinion for the Court, he said:

> "Accepting the premise of the Court of Appeals that the case was essentially a possessory action, we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law.. . . .The federal law issue, therefore, did not arise solely in anticipation of a defense. Moreover, we think that the basis for petitioners' assertation that they had a federal right to possession governed wholly by federal law cannot be said to be so unsubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise so completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits."

The Court then quoted with approval from *United States v. Farmers*, 125 F.2d 928 (CA2), cert denied sub nom *City of Salamanca v. United States*, 316 U.S. 694 (1942) and said:

> " 'State law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent.' Id at 932 There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law."

It is noteworthy that had the *Oneida* case not involved an Indian tribe asserting rights to land arising out of federal law, the well-pleaded complaint rule would have applied because the complaint simply alleged an action in ejectment. It parallels this case because there is no federal statute which makes Oklahoma's tax statutes

applicable to the Chickasaws. Appellees submit that the alleged right of the Chickasaws to be free of state taxation of their activities on tribal lands and to be immune from suit without valid waiver of sovereign immunity are rights which are no less significant than tribal rights to land ownership. Respondents submit that these are areas completely pre-empted by federal law and federal question jurisdiction was present.

But, the State misses the point when it concludes that the lower court's decision affirming dismissal rather than ordering remand turned on the finding of federal question jurisdiction. Whether the case was removed properly or improperly was not the issue. When a case is removed to the federal district court, it is removed. It is not a question of whether the federal court will accept it but, rather, what disposition will be made of it if it is subsequently determined that it was not within the federal court's jurisdiction. Removal does not depend on securing leave from either the state or the federal court, although the propriety of removal may be tested later in the federal court by a motion to remand. *Wright, Miller & Cooper 500, Section 3730 Procedure for Removal-14A Federal Practice and Procedure.* If there is exclusive state jurisdiction or concurrent state and federal jurisdiction, but the plaintiff has well-pleaded its complaint strictly with a state law cause of action, the case will be remanded to the state court. Under the law in effect at the time this matter was removed[3] if exclusive jurisdiction was vested in the federal court, it proceeded to determine the issues unless the state court from which it was removed did not have jurisdiction. If the state court was without subject matter jurisdiction, the federal court was without the necessary

derivative jurisdiction and was required to dismiss rather than remand. *Minnesota v. United States,* 305 U.S. 382 (1939).

As is previously noted, this case was remanded to the Tenth Circuit Court for reconsideration in light of *Caterpillar.* On remand the lower court correctly distinguished *Caterpillar.* There the plaintiffs had the option of either bringing an action created by state law or one created and governed by federal law. They proceeded under the state created cause of action in contract over which the state court had jurisdiction and, as noted by this court, their complaint was well-pleaded in that it did not facially involve a federal question.

The Circuit Court on remand, distinguished the instant case because the State was asserting a state created cause of action against a sovereign entity, whose sovereignty is created and defined by federal law. The Court said:

> "The named defendant is the Chickasaw Nation, a sovereign entity whose status is subject to and limited by congressional power alone. See *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982). Thus, as we noted in our prior opinion, absent its consent, the

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[3] This rule was abolished on June 19, 1986 after this cause was removed by amendment to 28 U.S.C. 1441. Subparagraph (e) now provides:

> "The Court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

Chickasaw Nation is subject to suit only under conditions prescribed by Congress. *State of Okla. ex rel. Oklahoma Tax Comm. v. Graham*, 822 F2d 951, 956 (10th Cir. 1987) Page 3."

The Circuit Court then correctly concluded that a complaint asserting a state created cause of action to impose a state tax in a state court against an Indian tribe on its commercial activities on tribal lands must affirmatively allege tribal or congressional waiver of immunity from suit to be "well-pleaded". See also *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977). The Court said that the State's complaint was not well-pleaded because it had failed to allege either tribal or congressional waiver of the Tribe's immunity from suit. It stated on page 4 of its decision:

> " . . . the absence of this essential element of subject matter jurisdiction is the essence of the federal question inherit in the State's action.
>
> In short the complaint showed that the state district court was patently without jurisdiction over either the parties or the subject matter."

It is well-established that even if it is subsequently determined that subject matter jurisdiction does not exist, a federal court has threshold jurisdiction to determine the extent of its jurisdiction over an action. *Land v. Dollar*, 330 U.S. 731, 739 (1947), *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376 (1947). As previously stated, it was also well-established, prior to the 1986 amendment to 28 U.S.C. 1441, a federal court acquired no jurisdiction in a case removed from a state court if the state court did not have jurisdiction. Threshold jurisdiction was necessary to decide if this derivative jurisdiction was present.

Having determined that the state court was without jurisdiction and that the complaint was not well-pleaded, the lower court then had to decide what disposition of the case was proper. Instead of applying *Caterpillar* regarding whether this case should have been remanded or dismissed, the Circuit Court followed this Court's teachings in *Lambert Run Coal Co.*[4]

In *Lambert Run* a coal mining company sued the railroad in state court to restrain it from obeying orders of the Interstate Commerce Commission. The railroad removed to federal court and then moved to dismiss. The trial court overruled the motion to dismiss and the injunctive relief was granted. The Fourth Circuit Court of Appeals reversed on grounds other than those raised in the trial court. This court affirmed but ordered the case dismissed rather than remanded.

Mr. Justice Brandies speaking for the Court said:

> " . . . As the state court was without jurisdiction over . . . the subject matter. . . ., the district court could not acquire jurisdiction. . . .by removal. The jurisdiction of the federal court on removal is in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or the parties, the federal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction."

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[4] In light of the importance accorded it by the Circuit Court and the fact that it is the basis for the ruling reaffirming dismissal, it is interesting to note that the State has completely neglected to address *Lambert Run Coal Co.* It is equally interesting to note that the minority opinion in the lower court ignores it.

* * * *

"The District Court should, therefore, have dismissed the bill as soon as it became apparent that the suit was one to set aside an order of the Commission. . . . and the Circuit Court of Appeals, in remanding the cause to the district court, should have directed a dismissal for want of jurisdiction and without prejudice."

For other decisions requiring the same result see *General Investment Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 288, 67 L.Ed.2d 244, 260, 43 S.Ct. 117 (1922); *Minnesota v. United States*, 305 U.S. 382 (1939); *Venner v. Michigan C.R. Co.*, 271 U.S. 127 (1926); *Goodrich v. Burlington Northern R.R. Co.*, 701 F.2d 129 (10th Cir. 1983). *State of Washington v. American League of Prof. Base Clubs*, 460 F.2d 654 (9th Cir. 1972); *Koppers Company v. Continental Casualty Company*, 337 F.2d 499, 502 (8th Cir. 1964).

The state relies heavily on *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) in support of its position that this matter should be remanded to the state court. But, the court there was dealing with a well-pleaded complaint in a state court action wherein jurisdiction was effectively pleaded and invoked. Not so here. Even this court in *Franchise Tax Board* recognized the rule in *Lambert Run* at footnote numbered 27 of the opinion which states:

"Indeed, precedent involving other statutes granting exclusive jurisdiction to the federal courts suggests that, if such an action were not within the class of cases over which the state and federal courts have

concurrent jurisdiction, the proper course for a federal district court to take after removal would be to dismiss the case altogether, without reaching the merits." (citing some of the above cited authorities)

Here, the state court clearly did not have jurisdiction because the complaint fails to allege necessary jurisdictional facts i.e. waiver of sovereign immunity.

The State next relies on *Gully v. First National Bank*, 299 U.S. 109 (1936) for the proposition that this matter should be remanded to the state court. Respondent does not take issue with the principles set forth in Mr. Justice Cardoza's well written opinion, but *Gully* is clearly distinguishable on the facts and the law involved in the Circuit Court's decision in this case. In *Gully*, the issue was whether there was federal question jurisdiction for removal purposes where the right to recover was dependent upon a federal statute. The defendant in *Gully* did not contend that the state court was completely without jurisdiction nor was that issue addressed. The Court simply held that the fact the cause involved interpretation of a federal statute did not necessarily create federal question jurisdiction.

The State says on page 6 of its petition that the *Gully* court found that in cases involving state taxation, it is impossible to plead a federal question. Respondents disagree. Application of state tax laws to Indian tribes must necessarily involve a federal question because it must be alleged how the state's courts were vested, by either the Tribe or Congress, with the authority to apply and enforce those laws. States may not unilaterally invest themselves with jurisdiction over Indian tribes. Therefore, in this context, it is not impossible to well-plead

how subject matter jurisdiction is present i.e. simply plead tribal or congressional waiver. The lower courts in this case found that it had not been pleaded and very pragmatically understood that it could never be successfully asserted. Had a valid waiver been present, the state would surely have alleged it.

Here the State is clearly attempting to enforce its tax laws against a sovereign entity without the consent of the Congress or the Tribe. The common law immunity of Indian tribes is coextensive with the immunity of the United States and can only be waived by express and unequivocal consent of the tribe or Congress. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59. In *Minnesota*, supra, the United States was a party defendant in a suit by the state. The United States removed to federal court and contended that the state court was without jurisdiction. This Court affirmed the Appeals Court's directive to dismiss. The co-extensive common law immunity of the Chickasaw Nation and its officers with that of the United States required the same result.

The Tenth Circuit Court determined, in exercising its threshold jurisdiction to determine jurisdiction, that both the state court from which the case was removed and the federal district court to which it was removed were without subject matter jurisdiction based on longstanding, well-established federal law. In accordance with principles laid down by the *Lambert Run* court it determined that the case was properly dismissed rather than remanded. The logic behind this rule is clear. Where neither court has subject matter jurisdiction, the federal

court does not have jurisdiction to make an order to remand but may only dismiss. The lower court's decision was not in conflict with this Court's decisions and does not require review.

II. DISMISSAL OF THIS ACTION BY THE LOWER COURT WAS MANDATED BY LONGSTANDING FEDERAL POLICY AND THE DECISIONS OF THIS COURT HOLDING THAT INDIAN TRIBES ARE IMMUNE FROM SUIT IN STATE OR FEDERAL COURTS ABSENT CONGRESSIONAL OR TRIBAL WAIVER

The State seeks to make the issue here something other than those involved in the complained of decision by the lower court. The State argues that it is entitled to a decision on the merits that results in application of its tax laws. But, the lower court properly did not reach the merits. Its decision strictly adhered to the issues raised by the preliminary motions and held that subject matter jurisdiction was not present because sovereign immunity barred this action in either the state or federal court.

This Court has consistently and without exception adhered to its longheld principle that Indian tribes are immune from suit absent unequivocally expressed consent by the Tribe or Congress. *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58. (A complete listing of all of this Court's decisions affirming this rule would probably exceed the amount of space allocated to respondent by the Court's rules.) The issue of sovereign immunity goes to the subject matter jurisdiction of the Court

since a sovereign is immune from suit except as its consents to be sued, and the terms of its consent to be sued in any court defines that court's jurisdiction to entertain the suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. Testan*, 424 U.S. 392, 399 (1976). Sovereign immunity applies "inspective of the merits" of the claim asserted against the tribe. *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), rev'd on other grounds, 463 U.S. 713 (1983). The State has not cited a single decision where this Court or any other federal court has deviated from the traditional rule.[5]

In fact, except for a lone Oklahoma Supreme Court decision, which is hereinafter discussed, none of the State's authorities involve situations where a tribe was a defendant and asserted sovereign immunity in its resistance to jurisdiction. The State is asking this court to overrule almost 200 years of precedent and strip Indian tribes of their inherent sovereignty to allow it to enforce its tax laws against them. It would have this Court remove both the United States Congress and the tribal governments from the process of determining when an Indian tribe had waived its sovereignty. In effect, it would have this Court, by decision amounting to purely impermissible legislation, reduce all Indian tribes in this country to mere social clubs completely subservient to the states and other local governments. This would effectively terminate Indian tribal governments. Respondent

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[5] The State contends that the Circuit Court's decision is in conflict with *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164. *McClanahan* did not even involve an Indian Tribe as a party. There, an individual tribal member initiated the litigation.

submits that should that concept ever become the policy of this country, the Congress will be the constitutionally appropriate branch of the federal government to establish it.

The State cites *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) on which it places much emphasis for its proposition that sovereign immunity is not a bar to this suit. It contends that because *Seneca-Cayuga* conflicts with decisions of the Tenth Circuit Court the instant case merits review. With regard to its being in conflict with the decisions of the Circuit Court, the State is correct but *Seneca-Cayuga* is also contrary to this Court's decisions. Respondents are unaware of any federal court that has accepted the Oklahoma Court's reasoning in holding the states' courts have jurisdiction over Indian tribes without regard to sovereign immunity. In fact, when *Seneca-Cayuga* was remanded to the trial court after its dismissal was reversed, the United States District Court for the Northern District of Oklahoma enjoined the state trial court from proceeding any further. *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma, et al.* No. 85-C-639-B consolidated with *Quapaw Tribe of Oklahoma v. State of Oklahoma, et al.* No. 86-C-393-B (N.D. Okla. June 5, 1986).[6] *Seneca-Cayuga* is so totally unique in being absolutely out of step with the decisions of this Court and that of all other federal courts, it has been uniformly rejected. The Oklahoma court, in its radical departure from traditional federal law, determined that the state courts had jurisdiction over Indian tribes on Indian country for purposes of regulating bingo gaming without the consent of the tribes or Congress. This unusual conclusion was reached against the backdrop of specific findings by that

Court that the activity was being conducted on "Indian Country" and that Oklahoma had not taken steps to comply with the requirements of Public Law 83-280, 67 Stat. 77 and 82 Stat. 77 (codified at 25 U.S.C. 1321-1323) App. E, F and G.

In its backdoor attempt to exercise jurisdiction over these Indian tribes, the court invoked a concept entirely new to Oklahoma jurisprudence and reasoned that the state courts had "residuary jurisdiction" on Indian Country. It said that residuary jurisdiction "is used to invest state courts with jurisdiction interstitially when the subject matter of cognizance does not infringe upon tribal self-government and has not been pre-empted by congressional legislation". The Oklahoma Court bottomed its position on *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984). This application of *Wold* was clearly misguided for at least two reasons. First, *Seneca-Cayuga* involved a situation where the Indian tribe was resisting the attempts to invoke state court jurisdiction. In *Wold* the Indian tribe sought to avail itself of the state court to pursue a claim against a non-Indian for activities occurring on Indian land. The second reason *Wold* is inapplicable is that there is no basis in Oklahoma for "residuary jurisdiction". Oklahoma had never taken any action prior to passage of Public Law 83-280 to exercise jurisdiction over Indian tribes as was the case in *Wold*. Nor has it subsequently taken the necessary steps to acquire jurisdiction under PL-280. *Seneca-Cayuga*. *Wold* simply held

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[6] This case is on appeal to the Tenth Circuit Court and has not been published. Therefore, the Court's decision is attached as Appendix D.

that while PL-280 does not divest a state of pre-existing and lawfully obtained jurisdiction, it provides no basis for a state which has made no such jurisdictional claim to accomplish by silence what Congress intended it to do under the terms of PL-280.

In light of the Oklahoma Supreme Court's predisposition to assume jurisdiction of tribal activities on Indian country, there should be no doubt why the State would like to have this matter remanded to its courts. A decision in the state court's conforming to federal law would require a complete and unlikely reversal of *Seneca-Cayuga*. Anything short of that would force the respondents to seek certiorari with this Court and the State is apparently willing to gamble on the odds that such a decision might not receive review by this court.

Finally, the State relies on *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943) in its quest for jurisdiction of its courts to tax Indian tribes. However, *Oklahoma Tax Commission* was not about taxing Indian tribes, sovereign immunity from suit, nor was an Indian tribe a party to the litigation. This was an action instituted by the United States to recover inheritance taxes imposed on transfers of estates of deceased Indians where this Court limited recovery to lands exempt from direct taxation. It does not address any of the issues properly before this Court.

Although respondents do not believe that the issue of whether the State may apply or not apply its sales taxes to the Indian tribes on Indian country is properly before this Court, it will be addressed briefly because the State in its petition has sought to interweave that issue with

the lower court decision it seeks to have reviewed. This Court recently rejected a petition for review of a case which presented the same issue. In *Indian Country, U.S.A., Inc. and Muskogee (Creek Nation) v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987 cert. denied June 27, 1988), the Oklahoma Tax Commission sought to apply its sales tax laws to gross receipts from bingo and concessions of a bingo gaming enterprise being conducted by the Creek Nation in Tulsa, Oklahoma. The Tribe sought injunctive relief in the federal district court. The Court ruled that the State of Oklahoma could not apply its tax laws to the tribal activities. The Circuit Court affirmed. The Court applied the federal pre-emption and infringements tests enunciated by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143 (1980) concluding: "the state's interest in taxing Creek bingo and related activities is minimal, and is incompatible with and outweighed by federal and tribal interests". The Court further stated:

> "The State also has a general interest in taxing its residents for whom it provides services. Nevertheless, this interest is substantially diminished when the residents engage in activities largely beyond the state's jurisdiction and control, unless the activity or circumstance somehow undermine the state's ability to protect its economy and tax base. As already discussed, this is not the case with respect to Creek Nation bingo. Moreover, the State has pointed to no services that it provides on Creek Nation lands that would justify the tax."

In closing, the State attempts to paint a picture of Oklahoma's Indian tribes sponging off the state and unfairly competing with non-Indian businesses. It neglects to mention that these tribal businesses were

established with the encouragement and pursuant to the policies of the federal government. The State omits the fact that income from these businesses is vitally needed to provide social and health benefits to poor Indians where there is a void in state services. Nor does it assert that the business community has complained about the jobs and revenues generated in rural communities and other places by these economic efforts of Indians in pursuit of established federal and tribal goals aimed toward improving the lives of a socially neglected people. "Moreover, the State has pointed to no services that it provides on [Chickasaw] lands that would justify the Tax." *Indian Country, USA*. Respondent submits that these persistent efforts to tax sovereign Indian tribes is a result of the pressures applied to the Tax Commission by the irresponsible spending habits of what has been termed, by most of Oklahoma's metropolitan press, as the worst "pork-barrel" legislature in the country. Perhaps, funding fewer make-work projects for relatives of legislators and such events as rattlesnake hunts and cowchip throwing contests by the legislature would relieve some of that pressure.

CONCLUSION

The decision of the Circuit Court in this case was not about the right to tax or not to tax as the state would have it be. The issue was whether, procedurally, the district court should have remanded to the state court or dismissed. Dismissal of this matter was in conformity to this Court's rule as set forth in *Lambert Run Coal* and *Minnesota* where it was clear that neither the state nor the

federal court had subject matter jurisdiction. There are no novel issues presented nor is the lower court's decision in conflict with the decisions of this court. As a result, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CONSTITUTION OF THE CHICKASAW NATION OF OKLAHOMA

PREAMBLE

We, the people of the Chickasaw Nation, acknowledging with gratitude the grace and beneficence of God, in permitting us to make choice of our own form of government, do, in accordance with the first, second, fourth and seventh articles of the Treaty between the United States, the Choctaws and Chickasaws, made and concluded at Washington City, June 22, A.D. 1855, and the Treaty of April 28, A.D. 1966, ordain and establish this Constitution for our government, within the following limits, to-wit:

Beginning on the north bank of Red River, at the mouth of Island Bayou, where it empties into Red River, about twenty-six miles on a straight line below the mouth of False Washita, thence running a northwesterly course along the main channel of said bayou to the junction of the three prongs of said bayou nearest the dividing ridge between Washita and Low Blue Rivers, as laid down on Captain R.L. Hunter's map; thence northerly along the eastern prong of said Island Bayou to its source; thence due north to the Canadian River; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red River and thence down Red River to the beginning;

Provided; however, if a line running due north from the eastern source of Island Bayou to the main Canadian, shall not include Allen's or Wapanucka Academy within the Chickasaw District, then an off-set shall be made from

said line, so as to leave said academy two miles within the Chickasaw District, north, west and south from the lines of boundary.

ARTICLE I
NAME

The name of this body shall be "the Chickasaw Nation."

ARTICLE II
CITIZENSHIP

Section I. This Chickasaw Nation shall consist of all Chickasaw Indians by blood whose names appear on the final rolls of the Chickasaw Nation approved pursuant to Section 2 of the Act of April 26, 1906, (34 Stat. 137) and their lineal descendants.

Section 2. The Tribal Legislature shall have the power to enact ordinances governing future citizenship and loss of citizenship in the Chickasaw Nation.

ARTICLE III
RIGHTS OF SUFFRAGE

Section 1. All citizens eighteen (18) years of age or older shall be deemed qualified electors under the authority of this Constitution; provided, they have duly registered to vote.

Section 2. No enrolled member of another tribe or person who votes as a citizen or member of another tribe shall be eligible to vote.

ARTICLE IV
BILL OF RIGHTS

Section 1. Nothing in this Constitution shall be interpreted in a way which would change the individual rights and privileges the tribal members have as citizens of the Chickasaw Nation, the State of Oklahoma, and the United States of America.

Section 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times the inalienable right to alter, reform or abolish their form of government in such a manner as they may think expedient; provided, such action is taken pursuant to this Constitution.

Section 3. No religious test shall ever required as a qualification for any office of public trust in this Nation.

Section 4. Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege, and no law shall ever be passed curtailing the liberty of speech, or of the press.

Section 5. The citizens shall have the right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with powers of government; for redress of grievances or other purposes, by address, or remonstrance.

ARTICLE V
DIVISION OF THE POWERS OF GOVERNMENT

Section 1. The powers of the government of the Chickasaw Nation shall be divided into three (3) distinct departments: 1. Legislative 2. Executive 3. Judicial. No person or collection of persons, being one of those

departments, shall exercise any power properly attached to either of the others.

Section 2. The officers of the Nation are to include all elective officials.

ARTICLE VI
LEGISLATIVE DEPARTMENT

Section 1. The Legislative authority of the Chickasaw Nation shall be vested in the Tribal Legislature.

Section 2. Members of the Tribal Legislature must be citizens of the Nation and have been residents of the Nation for at least one (1) year and of their respective district for at least six (6) months immediately preceding the election. They must remain residents of their elected district during the tenure of their office. They must be registered to vote and be at least twenty-five (25) years of age to serve as members of the Tribal Legislature.

Section 3. The Tribal Legislature shall consist of thirteen (13) members to be elected from the following districts according to an apportionment plan prescribed by the Tribal Legislature: Panola, Pickens, Tishomingo, Pontotoc. The district boundaries are as follows:

Panola District – Commencing at the mouth of Island Bayou, on the north bank of Red River, thence up said bayou to the line between the Chickasaws and Choctaws, thence along said line to Blue River, then up Blue River to the road that leads from Fort Washita to Fort Smith, where it crosses Blue River at Andrew Colbert's, thence along said road to Hatsborough, thence along the road that leads from Hatsborough to Tiner's, where it crosses Washita River, thence down said river to where it empties into Red River, thence down said river to the beginning point.

Pickens District – Commencing on the north bank of Red River, at the mouth of Washita River, thence up Red River to the 98th Meridian Line, thence north along said line to where it crosses Washita, down Washita to the beginning point.

Tishomingo District – Commencing where the road crosses Blue River that leads from Fort Washita to Fort Smith, at Andrew Colbert's, thence up Blue River to the fork above the old Dragoon crossing, thence up the eastern prong to the road which leads from Fort Arbuckle to Fort Smith, thence along said road to the crossing of the Washita River, thence down said river to the line of the Panola District, thence along said line to the beginning point.

Pontotoc District – Commencing on the east bank of Blue River, where the line crosses which runs between the Chickasaws and Choctaws, thence along said line to the Canadian River, thence up said river to the 98th Meridian Line, thence south along said line to Washita River, thence down said river to the line of the Tishomingo District, thence along said line to the line of the Panola District, thence down said line to the beginning point.

Section 4. For the first election under this Constitution, the thirteen (13) positions on the Tribal Legislature shall be apportioned among the four (4) districts pursuant to the number of registered voters who reside in each district together with those non-resident registered voters who formally designated their affiliation with one (1) of the four (4) districts. Each district shall have at least one (1) representative on the Tribal Legislature. Each nonresident registered voter shall choose one (1) district for the purpose of voting to choose a representative on the Tribal Legislature. On the date successful candidates are installed in office, there shall be a drawing of lots for each district to determine which representative will serve

for a three (3) year term. There shall be a second drawing of lots among the remaining nine (9) members of the Tribal Legislature to determine those five (5) who are to serve two (2) year terms and the four (4) who will each hold office for one (1) year, in order to establish a system of staggered terms of office. In the event of a tie vote in the initial election, the flip of a coin will determine the winner. Thereafter, members of the Legislature shall be elected for three (3) year terms and shall serve until their successors are duly elected and installed.

Section 5. Within nine (9) months following the first election of officials under this Constitution, the Tribal Legislature shall adopt a plan for reapportionment based on the number of registered voters of the four (4) districts, including those nonresidents who affiliate with each district. Apportionment based on the number of registered voters shall be used until such time a more reliable means can be established pursuant to legislative action.

Section 6. No person who has been convicted of a felony by a court of competent jurisdiction, shall be considered eligible for office in the Tribal Legislature.

ARTICLE VII
PRIVILEGES, DUTIES AND POWERS OF LEGISLATIVE DEPARTMENT

Section 1. The Tribal Legislature, at its first regular session each year, shall organize and elect officers from its membership. Officers to be elected are a Chairperson and a Secretary. A Recording Secretary and Sergeant-At-Arms (non-members of the Tribal Legislature) shall be

nominated by the Chairperson, and placed in office by and with the advice and consent of the Tribal Legislature.

Section 2. The Chairperson shall preside over all meetings of the Tribal Legislature.

Section 3. The Secretary of the Tribal Legislature shall maintain all records and enactments of the Tribal Legislature. They shall be kept on file in the Chickasaw Nation Headquarters, Ada, Oklahoma and available for inspection by Chickasaw citizens during normal office hours. All such records and enactments of the Tribal Legislature shall be the property of the Chickasaw Nation.

Section 4. The Tribal Legislature shall enact rules and regulations pertaining to the Chickasaw Nation.

Section 5. The Tribal Legislature shall prescribe procedures and regulations for voter registration.

Section 6. The Tribal Legislature shall prescribe election procedures and regulations for tribal elections.

Section 7. The Tribal Legislature shall make decisions pertaining to the acquisition, leasing, disposition, and management of real property, subject to Federal Law.

Section 8. The Tribal Legislature shall sit as a court in all cases of impeachment; its decision shall be final.

Section 9. The Governor shall prepare an Annual Tribal Budget and present it to the Legislature for approval. Approval shall require a majority vote of the Legislature. Rejection, amendment or alteration shall be considered by legislative act subject to executive veto.

Such veto shall be overridden only by an affirmative vote of at least nine (9) members of the Legislature.

Section 10. For all business of the Legislature, a quorum is required. A quorum consists of nine (9) members of the Legislature.

Section 11. The Tribal Legislature shall have the power to fix and prescribe salaries and allowances for all elected or appointed officials and employees of the Nation. The salary and allowances for elected and appointed officials shall not be increased or diminished during terms of office for which they have been elected. The Tribal Legislature will set a pay scale for all tribal employees.

Section 12. The Tribal Legislature shall adopt rules of procedure for operation of the Tribal Legislature within ninety (90) days after the initial installation of legislators.

ARTICLE VIII
SESSIONS OF THE TRIBAL LEGISLATURE

Section 1. Regular sessions of the Tribal Legislature shall be held on the third Friday of each month at 9:00 a.m. at the Chickasaw Nation Headquarters, Ada, Oklahoma, unless and until otherwise provided by the Tribal Legislature.

Section 2. Nine (9) members must be present to constitute a quorum.

Section 3. The Governor may call a special session of the Legislature at any time he deems necessary by notifying each member, by the most expedient way, at least twenty-four (24) hours in advance of the meeting

and shall call a special session upon receipt of a letter signed by at least nine (9) members of the Tribal Legislature.

Section 4. All regular and special sessions shall be open to the citizens of the Nation.

Section 5. Roll call votes shall be recorded, showing how each member of the Tribal Legislature voted.

Section 6. Robert's Rules of Order shall be followed in conducting Tribal Legislature business unless in conflict with this Constitution.

ARTICLE IX
ORDER OF BUSINESS

The order of business at any regular or special session of the Tribal Legislature shall be as follows; provided, this order of business may be suspended by the Tribal Legislature for any meeting:

1. Call to Order
2. Roll Call
3. Reading of minutes of last session
4. Unfinished business
5. Reports of Committees
6. New business (comments from citizens)
7. Adjournment

ARTICLE X
EXECUTIVE DEPARTMENT

Section 1. The Supreme Executive power of this Nation shall be vested in a Chief Magistrate, who shall be styled "The Governor of the Chickasaw Nation."

Section 2. The Lieutenant Governor shall assist the Governor and perform all duties as assigned to him by the Governor.

Section 3. The Governor and the Lieutenant Governor shall run as a team and shall be elected for a term of four (4) years and shall serve until their successors have been elected and installed.

Section 4. Any citizen of the Chicksaw Nation who is at leasty thirty (30) years of age and who possesses no less than one-quarter (1/4) of Chickasaw Indian Blood may be eligible to become a candidate for the office of Governor or Lieutenant Governor.

Section 5. The Governor and the Lieutenant Governor must be registered to vote and must have been residents of the Chickasaw Nation for at least one (1) year immediately preceding any election for which they are candidates and must remain residents of the Chickasaw Nation during the tenure of their office.

Section 6. No person who has been convicted of a felony by a court of competent jurisdiction shall be considered eligible for either of the executive offices.

ARTICLE XI
PRIVILEGES, DUTIES AND POWER OF EXECUTIVE DEPARTMENT

Section 1. The Governor shall perform all duties appertaining to the office of Chief Executive. He shall sign official papers on behalf of the Nation.

Section 2. The Governor shall have power to establish and appoint committees, members, and delegates to represent the Chickasaw Nation, by and with the advice and consent of the Tribal Legislature.

Section 3. The Governor shall have power to veto any decision of the Tribal Legislature and it must be done within five (5) working days after passage and written presentation; provided, the Tribal Legislature may override the Governor's veto in accordance with Article VII, Section 9.

Section 4. The Governor shall prepare and submit an annual tribal budget to the Tribal Legislature.

Section 5. The Lieutenant Governor shall serve in the absence of the Governor and when serving shall have all the privileges, duties and powers of the Governor.

ARTICLE XII
JUDICIAL DEPARTMENT

Section 1. The Judicial authority of the Chickasaw Nation shall consist of a three (3) member court elected by popular vote by qualified voters of the Chickasaw Nation.

Section 2. Members of the Judicial Department must be qualified electors, citizens of the Chickasaw

Nation and residents of the Chickasaw Nation during tenure of their office.

Section 3. Tribal Judges shall be elected for terms of three (3) years and shall serve until their successors are duly elected and installed. In the initial election, judges shall serve terms of one (1), two (2) and three (3) years to be determined by lot in order to establish staggered terms.

Section 4. On an annual basis, the three (3) judges shall select the presiding judge from among their number.

Section 5. No person who has been convicted of a felony by a court of competent jurisdiction shall be eligible for judicial office.

ARTICLE XIII
PRIVILEGES, DUTIES AND POWERS OF THE JUDICIAL DEPARTMENT

Section 1. The judicial Department shall have jurisdiction to decide disputes by vote of two (2) members, arising under any provision of this Constitution or any legislation enacted by the Tribal Legislature and such other jurisdiction as may be conferred upon it by the Tribal Legislature.

Section 2. Rules of procedure for the Judicial Department shall be prescribed by the Judicial Department within sixty (60) days of its members taking office and shall insure that the citizen receives due process of law and a prompt and speedy trial. Those procedures shall be presented to the Legislature which must act on those procedures within sixty (60) days after such presentation, otherwise, those procedures will become effective.

Section 3. The decisions of the Judicial Department shall be final.

Section 4. The Tribal Judicial Department shall have jurisdiction to hear claims regarding malapportionment. If a reapportionment plan is not adopted at least ninety (90) days before the election, then the Judicial Department shall have jurisdiction to prepare a reapportionment plan for submission to the Legislature.

ARTICLE XIV
INITIATIVE PETITION

Section 1. Upon submission to the Judicial Department of a valid petition, outlining the proposed measure, and signed by at least twenty percent (20%) of the registered voters of the Chickasaw Nation, it shall be the duty of the Tribal Legislature, within sixty (60) days, to submit the proposition to a vote of the electorate; provided, that if a petition is presented within one hundred eighty (180) days of the next regular election, the proposition shall be presented to the voters at that time.

Section 2. The election shall be conducted pursuant to rules and procedures prescribed by the Tribal Legislature.

Section 3. Passages of the proposition shall require a majority of votes cast; provided, at least thirty percent (30%) of the registered voters cast ballots.

ARTICLE XV
FILLING VACANCIES

Section 1. In case of death, resignation, impeachment, or recall of the Governor, the Lieutenant Governor shall immediately become Governor for the remainder of

the unexpired term. The Chairperson of the Trial Legislature shall immediately succeed to the office of Lieutenant Governor for the unexpired term. The Tribal Legislature shall elect a member of the Legislature to serve the unexpired term of the Chairperson.

Section 2. In the event of vacancies occuring in the Tribal Judicial Department or Tribal Legislature, a special election shall be held within sixty (60) days of the vacancy, or reasonably delayed until the next regularly scheduled election for that position. The vacancy shall be filled by popular vote.

ARTICLE XVI
IMPEACHMENT AND RECALL OF OFFICIALS

Section 1. Impeachment

(a) Any elected official shall be subject to impeachment for willful neglect of duty, corruption in office, habitual drunkenness, incompetency, becoming incapable of performing his duties or any offense involving moral turpitude while in office.

(b) Upon submission to the Judicial Department of a valid petition, stating the cause of action, and signed by not less than twenty-five percent (25%) of the registered voters residing within the district or area from which the official was elected, it will be the duty of the Judicial Department to determine the validity of the charges and file formal impeachment charges.

(c) The official against whom charges may be preferred, shall be entitled to a hearing by the Tribal Legislature under rules and procedures prescribed by the Tribal Legislature.

(d) The official against whom articles of impeachment are preferred, shall be suspended from the exercise of duties of his office during the pendency of his impeachment proceedings.

(e) The Tribal Legislature shall appoint a prosecutor to present the charges before the Tribal Legislature. Such prosecutor shall be a citizen of the Nation and shall not be employed or hold office in the Nation.

(f) The Tribal Legislature shall sit as a court in all cases of impeachment and its decision shall be final.

(g) The Tribal Legislature shall prescribe rules and procedures that are necessary to carry into effect the provisions of this Article.

(h) The ten (10) votes shall be required to impeach the official.

Section 2. Recall

(a) Upon submission to the Judicial Department of a valid petition, stating the cause for action, and signed by not less than twenty-five percent (25%) of the registered voters residing within the district or area from which the official was elected, it shall be the duty of the Tribal Legislature to call and conduct, within sixty (60) days, a recall election.

(b) The election shall be conducted pursuant to rules and procedures prescribed by the Tribal Legislature.

(c) Recall from office shall require a majority of votes; provided, thirty percent (30%) or more of the registered voters cast ballots.

(d) Only one (1) official shall be subject to recall at any given recall election.

(e) Any official shall be subject to the recall provision only one (1) time during his term of office.

ARTICLE XVII
OATH OF OFFICE

All elected or appointed officials shall take the following oath:

I,___, do solemnly swear (or affirm) that I will support, obey and defend the Constitutions of the Chickasaw Nation, and the United States of America and will discharge the duties of my office with fidelity, so help me God.

ARTICLE XVIII
AMENDMENT

Section 1. Proposed amendments to this Constitution may be initiated by either of the following methods:

(a) A resolution of the Tribal Legislature adopted by at least nine (9) affirmative votes.

(b) A valid petition submitted to the Tribal Legislature signed by not less than twenty percent (20%) of the registered voters of the Chickasaw Nation.

Section 2. Amendments proposed by either (a) or (b) in the above section shall be submitted to a vote of the electorate in an election called for that purpose by the Governor and conducted pursuant to rules and procedures prescribed by the Tribal Legislature.

Section 3. Any amendment adopted by a majority of the votes cast in the election shall be submitted to the Secretary of the Interior, or his authorized representative, for approval action. If no action is taken within thirty (30) days following its receipt by the Secretary's authorized representative, the amendment shall be deemed approved and it shall thereafter be effective.

ARTICLE XIX
EFFECTIVE DATE OF CONSTITUTION

This Constitution shall become effective when approved by the Secretary of the Interior and ratified by the Chickasaw people.

ARTICLE XX
APPROVAL

I, John W. Fritz, Deputy Assistant Secretary – Indian Affairs (Operations) by virtue of the authority delegated to me by 209 D.M. 8.3, do hereby approve this Constitution of the Chickasaw Nation of Oklahoma. It shall become effective upon ratification; provided, that nothing in this approval shall be construed as authorizing any action under this document that would be contrary to Federal Law.

John W. Fritz
Deputy Assistant Secretary –
Indian Affairs (Operations)

Washington, D.C.
Date: July 15, 1983

ARTICLE XXI
CERTIFICATE OF RATIFICATION

Pursuant to the June 17, 1981, order of the U.S. District Court for the District of Columbia, as amended

January 6, 1983, in Cravatt v. Watt, Civil No. 77-1664, the Deputy Assistant Secretary – Indian Affairs (Operations), on July 15, 1983, approved this Constitution and authorized the calling of an election for its ratification to be conducted on August 27, 1983. On August 27, 1983, the qualified voters of the Chickasaw Nation duly ratified/rejected this Constitution by a vote of___for, and___against. The results are hereby certified by members of the Chickasaw Election Commission shown below:

Fred L. Ragsdale, Jr., Arbitrator/Administrator

Charles Guy Tate, Representative for Plaintiffs

Sally Bell, Representative for Plaintiffs

Clarence Lee Cravatt, Representative for Plaintiffs

Pat Woods, Representative for Tribal Defendant

Ted Key, Representative for Tribal Defendant

Kenneth Meeler, Representative for Tribal Defendant

Ardmore, Oklahoma

Date: August 27, 1983

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

THE CHICKASAW NATION, JAN GRAHAM, DONNA BELLEFUELLE, NORMA WILLIAMS, STEPHANIE DAY, JEAN MANN, and HOWARD HILL, Plaintiffs, v. THE STATE OF OKLAHOMA, ex rel. FRED COLLINS, District Attorney for Murray County, Oklahoma, RON THOMAS, MIKE GRIFFIS, KEITH WOODELL, MARVIN PIERCE, MIKE MORROW, MICKEY WEBB, JIM LANCE, HARRIS PENNER, B.J. FIELDS, DAVE PITTMAN, RAY GOODWIN, and; CITY OF SULPHUR, OKLAHOMA, Defendants.	No. 86-32-C

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed Sept. 30, 1986)

The court has before it plaintiffs' motion for summary judgment in this action for declaratory and injunctive relief against the State of Oklahoma *ex rel.* the District Attorney for Murray County and various city officials of the City of Sulphur, Oklahoma. Plaintiffs Chickasaw Nation (hereafter Tribe) and six employees who operate the Tribe's bingo enterprise request this court enter an order declaring that the State's and City of Sulphur's jurisdiction (both civil and criminal) does not extend to cover the Tribe's bingo enterprise. Plaintiffs further seek injunctive relief prohibiting the defendants

from in any way regulating or interfering with their bingo enterprise.

The court by order dated February 4, 1986, denied plaintiffs' application for a preliminary injunction. By agreement, the parties have now submitted this action for a determination on plaintiffs' motion for summary judgment. The parties submitted various affidavits, court decisions, briefs, and the transcript from the hearing on plaintiffs' application for a preliminary injunction held January 28, 1986. Having carefully reviewed all materials, the court enters this order granting plaintiffs' motion for summary judgment and orders that a permanent injunction be issued forthwith.

STATEMENT OF UNDISPUTED FACTS

1. The Tribe is a federally recognized Indian tribe governed by its tribal constitution with the approval of the Secretary of Interior.

2. In October 1984, the Tribe through its Tribal Legislature enacted the Chickasaw Gaming Act of 1984, Chickasaw Nation Enactment No. 85-1, which establishes and regulates the operation of bingo games on land owned by the Tribe.[1]

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[1] Overton James, Governor of the Chickasaw Nation, and Joe Parker, Acting Area Director, Muskogee Office, Bureau of Indian Affairs, provided the bulk of the information contained within this statement of undisputed facts during the hearing on plaintiffs' application for a preliminary injunction held on January 28, 1986.

3. The Tribe has engaged in bingo at the Chickasaw Motor Inn, Sulphur, Oklahoma, in order to foster economic self-sufficiency and to ease the burden resulting from reductions in federal expenditures for tribal programs. The bingo operation is owned and operated by the Tribe.

4. The income generated from the Tribe's bingo operations is used to provide and supplement health and welfare services for tribal members.

5. On January 25, 1986, the Tribe and its employees (the individual plaintiffs herein) were conducting bingo games at the Chickasaw Motor Inn, Sulphur, Oklahoma.

6. The Chickasaw Motor Inn is located on land previously part of the Chickasaw allotment and thereafter reacquired from the Economic Development Administration in 1972 by the Tribe with tribal trust monies. The property is more particularly described as follows:

> All of Lots Eleven (11), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Twenty-Nine (29), Thirty (30), Thirty-One (31), Thirty-Two (32), Thirty-Three (33), Thirty-Four (34), Thirty-Five (35), Thirty-Six (36), Thirty-Seven (37), Thirty-eight (38), in Block One Hundred Fifty-Six (156), in the City of Sulphur, Oklahoma, according to the Re-Subdivision thereof, Murray County, Oklahoma.

7. In August 1985, the Tribe conveyed the subject property to the United States of America in trust for the Tribe.

8. The federal government has supervision and control over the Tribe's activities on the land.

9. The Tribe's bingo operations are not licensed by the State of Oklahoma.

10. On January 25, 1986, the defendants entered the Chickasaw Motor Inn; specifically, the bingo room, and confiscated bingo equipment and monies and arrested the individual plaintiffs who were conducting the game.

11. The Tribe estimates an annual net income derived solely from the operation of bingo to be $75,000.00 to $80,000.00.[2]

CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 and 1362. Venue is proper in this court pursuant to 28 U.S.C. §1391(b).

2. Under 18 U.S.C. §1151(a) Indian Country is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation . . . ."

3. Any ambiguities in the construction of statutes should be resolved in favor of the Indians. *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918). The determination of Indian Country land does not depend upon

[2] The affidavit of John Clark Caldwell, III, President of Enterprise Management Consultants, Inc. which has managed Pottawatomie bingo at Shawnee, Oklahoma, estimates gross *revenue* generated from the Tribe's bingo operations to be between $260,000.00 and $300,000.00 per year. Additionally, the affidavit of plaintiff Jan Graham, Manager of the Chickasaw Motor Inn, estimates the Tribe's motel and restaurant operations at the inn will lose $263,000.00 per year if bingo is prohibited at the Chickasaw Motor Inn.

the label used in designating them. *United States v. McGowan*, 302 U.S. 535 (1938). Rather, the test to be applied for a determination of Indian Country is whether the land "has been validly set apart for the use of the Indians as such, under the superintendence of the Government." *United States v. John*, 437 U.S. 634, 649, *quoting United States v. Pelican*, 232 U.S. 442, 449 (1914).

4. The Chickasaw Motor Inn is located on tribal trust land appropriated and set apart for the use and support of the Tribe under the superintendence of the United States Government and is therefore Indian Country as defined in 18 U.S.C. §1151(a). *See, John* at 649, *Pelican* at 449; *Cheyenne-Arapaho Tribes v. State of Okl.*, 618 F.2d 665, 667-669 (10th Cir. 1980).

5. Absent the consent of Congress, states have no authority over Indians in Indian Country. *See, Williams v. Lee*, 358 U.S. 217, 220 (1959); *Fisher v. District Court*, 424 U.S. 382 (1976); *John* at 651.

6. In 1953, express Congressional consent was given through the enactment of Pub.L. 83-280 (hereafter PL-280) for the states to assume criminal and/or civil jurisdiction over Indians in Indian Country. Pub.L. 83-280, 67 Stat. 588, re-enacted in Indian Civil Rights Act of 1968, 82 Stat. 77 (codified as amended at 25 U.S.C. §§1301-1303).

7. The State of Oklahoma has not met the requirements of PL-280 for assumption of criminal and/or civil jurisdiction over Indians in Indian Country. *State of Oklahoma ex rel. Thomas May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77 (Okla. 1985); *Confederated Bands & Tribes of Yakima Indian Nation v. Washington*, 550 F.2d 443, 445 N.3 (9th Cir. 1977).

8. Absent Congressional consent and a concomitant assumption of jurisdiction by the State, Indian Country state jurisdiction is preempted both by federal protection of tribal self-government and by rights granted or preserved by federal law. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973); *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (9th Cir. 1986). A "particularized inquiry into the nature of the state, federal, and tribal interests at stake," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), is necessary for a determination as to proper state jurisdiction in Indian Country.

9. Current federal tribal policy advocates tribal self-determination, self-sufficiency, and economic development. *Statement by the President*: Indian Policy, The White House. 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Indian tribal bingo games have been recognized as one way to support this current federal policy. *Cabazon*, at 904-905.

10. The state's significant interests in imposing their regulatory scheme to negate the siphoning of revenues and preventing the infiltration of organized crime are not supported by persuasive evidence which would make the state's interests rise to a level sufficient to overcome and outweigh the strong and compelling interests of the Tribe and federal government which are present in this case.

11. The court finds that the interests of the Tribe in fostering economic self-sufficiency, easing the burden resulting from reductions in federal expenditures for tribal programs, and exercising its sovereignty outweigh

the interests of the state. Furthermore, the court finds that the mutual interests of the Tribe and federal government in providing the climate compatible with tribal economic self-sufficiency outweigh the state's interests.

12. The court finds that after viewing the record in the light most favorable to the defendants, there exists no genuine issue as to a material fact and plaintiffs are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

It is therefore ordered that plaintiffs' motion for summary judgment be granted.

It is further ordered that a permanent injunction shall be issued.

It is further ordered that defendants return all confiscated monies and equipment taken from plaintiffs on January 25, 1986.

IT IS ALL SO ORDERED this 30 day of September, 1986.

/s/ Frank H. Seay
Frank H. Seay
United States District Judge

IN THE UNITED STATES DISTRICT COURT TO THE EASTERN DISTRICT OF OKLAHOMA

THE CHICKASAW NATION, JAN GRAHAM, DONNA BELLEFUELLE, NORMA WILLIAMS, STEPHANIE DAY, JEAN MANN, and HOWARD HILL,
Plaintiffs,

v.

THE STATE OF OKLAHOMA, ex rel. FRED COLLINS, District Attorney for Murray County, Oklahoma, RON THOMAS, MIKE GRIFFIS, KEITH WOODELL, MARVIN PIERCE, MIKE MORROW, MICKEY WEBB, JIM LANCE, HARRIS PENNER, B.J. FIELDS, DAVE PITTMAN, RAY GOODWIN, and CITY OF SULPHUR, OKLAHOMA,
Defendants.

No. 86-32-C

PERMANENT INJUNCTION

(Filed Sept. 30, 1986)

TO: FRED COLLINS, DISTRICT ATTORNEY FOR MURRAY COUNTY, OKLAHOMA, AND EACH ASSISTANT DISTRICT ATTORNEY, AGENT, EMPLOYEE, SERVANT, OR OTHER REPRESENTATIVE OF THE DISTRICT ATTORNEY FOR MURRAY COUNTY AND ALL PERSONS ACTING IN ACTIVE CONCERT WITH YOU OR UNDER YOUR CONTROL.

TO: THE CITY OF SULPHUR, OKLAHOMA, RON THOMAS, MIKE GRIFFIS, KEITH WOODELL, MARVIN PIERCE, MIKE MORROW, MICKEY WEBB, JIM LANCE, HARRIS PENNER, B. J. FIELDS, DAVE PITTMAN, RAY GOODWIN, AND ANY AGENT, EMPLOYEE, SERVANT, OR OTHER REPRESENTATIVE OF THE CITY

OF SULPHUR AND ALL PERSONS ACTING IN ACTIVE CONCERT WITH THE CITY OF SULPHUR OR UNDER ITS CONTROL.

On this 30 day of September, 1986, pursuant to the order of this court granting plaintiffs' motion for summary judgment, IT IS ORDERED that Fred Collins, District Attorney for Murray County, Oklahoma, and each Assistant District Attorney, agent, employee, servant, attorney or other representative of the district attorney for Murray County, and all persons acting in active concert with him or under his control be; and the City of Sulphur, Ron Thomas, Mike Griffis, Keith Woodell, Marvin Pierce, Mike Morrow, Mickey Webb, Jim Lance, Harris Penner, B. J. Fields, Dave Pittman, Ray Goodwin, and any agent, employee, servant, or other representative of the City of Sulphur and all persons acting in active concert with the City of Sulphur or under its control be; and hereby are, permanently enjoined from the following:

1. Seeking or procuring the civil or criminal prosecution of any person or entity managing, working for, or participating in the activities of the Chickasaw Nation tribal bingo enterprise on the property located in Sulphur, Oklahoma, and more particularly described as follows:

> All of Lots Eleven (11), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Twenty-Nine (29), Thirty (30), Thirty-One (31), Thirty-Two (32), Thirty-Three (33), Thirty-Four (34), Thirty-Five (35), Thirty-Six (36), Thirty-Seven (37), Thirty-eight (38), in Block One Hundred Fifty-Six (156), in the City of Sulphur, Oklahoma, according to the Re-Subdivision thereof, Murray County, Oklahoma;

2. Confiscating, removing, seizing, or otherwise interfering with the property and receipts of the tribal bingo enterprise;

3. Interfering in any way with the peaceable operation of the tribal bingo enterprise.

/s/ Frank H. Seay
Frank H. Seay
United States District Judge

APPENDIX C

CHICKASAW NATION
ENACTMENT NO. 85-1

GAMING ACT

BE IT ENACTED by the Tribal Legislature of the Chickasaw Nation:

Section 1. Short Title.

This Act shall be cited as the "Chickasaw Gaming Act of 1984."

Section 2. Purpose.

The purpose of the gaming act is to make lawful and to regulate the conducting of certain games of chance by the authority of the Chickasaw Nation.

Section 3. Definitions.

As used in the gaming act:

A. **"Gaming"** shall mean the engaging of persons in a contest or activity for the purpose of amusement or gain.

B. **"Proceeds"** shall mean receipts from the sale of shares, tickets, or rights in any manner connected with participation in a game of chance or the right to participate therein, including any admission fee or charge, the sale of equipment or supplies, and all other miscellaneous receipts.

C. **"Chickasaw Nation"** shall mean the tribe of Indians located within the boundaries set forth in the Constitution of the Chickasaw Nation, adopted August 27, 1983, being duly recognized by the Secretary of Interior of the United States of America and other agencies of the United States of America and other governments, as a self-governing, independent, sovereign government; sometimes hereinafter called "Tribe."

D. **"Tribal Legislature"** shall mean the Tribal Legislature of the Chickasaw Nation, which is the recognized

governing body of the Tribe, possessing plenary power over the people, land and property within the exterior boundaries of the Tribe.

E. **"Player"** shall mean any person, Indian or non-Indian and whether a Chickasaw Indian or not, paying some amount of United States currency to the Tribe or its agent, servant or employee for admission to and participation in gaming and who has a reasonable expectation of receiving a prize.

F. **"Prizes"** shall mean and refer to any United States currency, cash, or other property or thing of value awarded to a player of gaming, or players in a series of games.

G. **"Occasion"** shall mean a single gathering or session at which a series of successive games is played.

H. **"Person"** shall mean a natural person, either Indian or non-Indian, and either Chickasaw member or non-chickasaw member.

I. **"Premises"** shall mean the room, hall, enclosure or outdoor area used for the purpose of gaming.

Section 4. Operations

It shall be lawful for the Chickasaw Nation, its agents, servants and employees to perform, conduct, operate, maintain or supervise gaming or series of gaming events at any premises, on land owned by the Chickasaw Nation. It shall be unlawful for any other person, corporation, company, firm or other entity, except the Chickasaw Nation, to perform, conduct, operate, maintain or supervise gaming or series of gaming events on land owned by the Chickasaw Nation.

Gaming may be conducted each and every day of the week and at any hour of the day, except not later than 2:00 a.m. and not beginning a new occasion earlier than the next 10:00 a.m. following.

There shall be no limit as to the prize money or prizes for any single game or occasion.

All persons involved in the conduct of gaming must be bonafide employees of the Chickasaw Nation or bonafide employees of its agents, servants or employees.

No person of under the age of 21 years shall be allowed to participate in gaming.

Section 5. Name Tags.

All persons operating or assisting in the operation or conduct of any gaming shall wear legible tags evidencing their names and the legend and symbol of the Chickasaw nation. Tags must be visible and worn by or otherwise affixed to all persons operating or assisting in the operation of gaming.

Section 6. Proceeds.

All of the proceeds derived from gaming, after payment of the prize money, expenses and fees, shall be collected by the Chickasaw Nation and deposited into the tribal treasury. The use of such proceeds shall be subject to the regular budgeting process.

NOW, THEREFORE, BE IT ENACTED that the Chickasaw Gaming Act of 1984 is hereby approved by the Tribal Legislature of the Chickasaw Nation.

CERTIFICATION

The foregoing was adopted by the Chickasaw Nation Tribal Legislature by a vote of 11 ayes, 0 nays and 2 abstained with a quorum being present at a meeting held on the 19th day of October 1984.

_____
Robert Stephens, Chairman
Chickasaw Tribal Legislature

_____
Overton Cheadle, Secretary
Chickasaw Tribal Legislature

Concur: _____
Overton James, Governor
Chickasaw Nation

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SENECA-CAYUGA TRIBE OF OKLAHOMA, Plaintiff, v. STATE OF OKLAHOMA, By and Through THOMAS H. MAY, District Attorney of Ottawa County, Oklahoma, BOB SILLS, Sheriff of Ottawa County, Oklahoma, JUDGE JON D. DOUTHITT, Judge of the District Court of Ottawa County, Oklahoma, Defendants.	)	No. 85-C-639-B (Consolidated with 86-C-393-B)
QUAPAW TRIBE OF OKLAHOMA, et al., Plaintiffs, v. STATE OF OKLAHOMA, et al., Defendants.	)	

OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed Jun 5, 1986)

I. INTRODUCTION

In March of 1983, the State of Oklahoma filed suit in the District Court for Ottawa County, Oklahoma, seeking to enjoin the Quapaw and Seneca-Cayuga Indian tribes from conducting on tribal lands bingo operations which

were not licensed by the state and which otherwise violated the Oklahoma gaming laws. The Indian bingo games violated State laws by operating on Sundays, operating more frequently than allowed and by offering cash jackpots exceeding the statutory limit. 21 Okl.St.Ann. §995.1 *et seq*. Shortly after the State filed suit, the Seneca-Cayuga Tribe filed a Complaint before this Court and a temporary restraining order was entered restraining state officials from enforcing the gaming laws on Indian land. *Seneca-Cayuga Tribe of Oklahoma v. Ingram*, No. 83-C-236-C (N.D.Okla. filed March 10, 1983). A preliminary injunction was issued on March 17, 1983, by another judge of this court.

On March 18, 1983, Ottawa County District Judge Jon D. Douthitt dismissed the state court lawsuit, holding that Oklahoma had not taken the steps required to assert jurisdiction over the Indian lands in question, therefore, the state court lacked subject matter jurisdiction. After the state court action was dismissed, the Seneca-Cayuga Tribe voluntarily dismissed its federal court action on March 28, 1983.

The state appealed Judge Douthitt's ruling to the Supreme Court of Oklahoma, and on July 2, 1985, the Oklahoma Supreme Court reversed the lower court, holding the state might have jurisdiction and remanded the matter to the state court for an evidentiary hearing to determine whether state regulation of the bingo games on Indian land was proper. *State of Oklahoma ex rel. Thomas*

May v. Seneca-Cayuga Tribe of Oklahoma, 711 P.2d 77 (Okl. 1985)[1] (hereafter, "Seneca-Cayuga").

The Oklahoma Supreme Court made four findings. First, the court found that the Quapaw and Seneca lands in question are "Indian Country" as defined by 18 U.S.C. §1151(c). Second, that Public Law 83-280, enacted by Congress in 1953 to allow states to assume civil and criminal jurisdiction over Indian County, does not bar Oklahoma from asserting jurisdiction in Indian Country, even though the state has never taken steps to comply with the requirements of PL-280. Third, that Oklahoma is not barred from enforcing its bingo laws in Indian Country by the doctrine of tribal sovereign immunity, because, in the court's view, that doctrine has been displaced by principles of federal pre-emption and infringement on tribal self-government. The court found Congress had not pre-empted the states from acting in this area and that tribal self-government was not infringed because bingo is not a " traditional tribal activity." *Seneca-Cayuga, supra* at 90. Therefore, said the court, the state has "residuary jurisdiction" over bingo in Indian Country emanating from the inherent police powers of the state. *Seneca-Cayuga* at 88, n. 60. Finally, the Court determined that the issue of whether the State could assert jurisdiction over the Indian bingo operations was a mixed question of fact and law. The matter was remanded to the Ottawa County District Court with directions that that court hold an

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[1] The state brought separate appeals of the trial court's rulings concerning the Quapaws and Senecas. The appeals were consolidated for disposition by the Oklahoma Supreme Court.

evidentiary hearing to determine if jurisdiction were proper under the circumstances presented in these cases.

Before the state court could conduct the evidentiary hearing, the Senecas filed suit in this court to enjoin Ottawa County officials from enforcing the gaming laws against them and to enjoin Judge Douthitt from proceeding with the mandated hearing. On April 22, 1986, the Quapaw Tribe filed suit in this court seeking to enjoin the same parties from interfering with the bingo operations on the Quapaw land. On May 7, 1986, this court consolidated the Seneca and Quapaw cases for purposes of a hearing on plaintiffs' Application for Preliminary Injunction and for trial. Following hearings on May 5 and 6, the court enjoined Judge Douthitt from taking any further action in these matters until further notice of this court, and enjoining the Ottawa County District Attorney and Sheriff, from seeking to enforce the state gaming laws against the bingo operations on Seneca and Quapaw lands. The Court's Order provided that a formal Order containing the Court's Findings and Conclusions supporting its decision to enter a preliminary injunction would follow. This Order contains those Findings and Conclusions.

The Court is aware that federal courts are reluctant to enjoin pending state court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). When a federal court is asked to enjoin state proceedings, the normal course is to reject that request. Id. at 45. The principle of comity which underlies respect for state court proceedings precludes any presumption that state courts will not adequately safeguard

federal constitutional rights. *Middlesex Co. Ethics Committee v. Garden State Bar As. ...* 457 U.S. 423 (1982). Proceedings in state court should normally be allowed to continue unimpaired by intervention of lower federal courts, with relief from error, if any, through the state appellate courts and, ultimately, the United States Supreme Court. *Ferrer Delgado v. Syliva de Jesus*, 440 F.Supp. 979 (D.Puerto Rico 1976).

Under *Younger* and earlier cases [*see, Fenner v. Boykin*, 271 U.S. 240 (1926); *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935); *Beal v. Missouri Pac. R. Co.*, 312 U.S. 45 (1941); *Watson v. Buck*, 313 U.S. 387 (1941); *Williams v. Miller*, 317 U.S. 599 (1942); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943)], the normal course of action for a federal court asked to enjoin pending state criminal proceedings is to deny the request. However, under certain narrowly defined circumstances, injunctive relief is appropriate. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Younger, supra.* Although *Younger* did not specify these circumstances in detail, it made it clear that an injunction would be appropriate in certain "extraordinary circumstances." *Younger* at 53-54. A key to determining when an injunction should issue is the likelihood that without an injunction, movant will suffer irreparable injury. However, the threat of injury must be "great and immediate." *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Massachussetts State Grange v. Benton*, 272 U.S. 525, 527 (1926). Under the extraordinary circumstances presented in this case, the Court finds that an injunction is appropriate.

Normally, a defendant facing state court proceedings would have the protection of appeal through the state

appellate system. However, in this case the highest appellate court in the state has already ruled adversely to the movants. By determining that the state of Oklahoma is not precluded from enforcing its gaming laws in Indian Country, the Oklahoma Supreme Court has resolved the ultimate issue herein against the Indian tribes. Although the Ottawa County District Court could determine, after an evidentiary hearing, that the state cannot enforce its gaming laws under the facts of this case, the fundamental contention of the Indian tribe – that the state lacks jurisdiction over Indian bingo games operated in Indian Country – has been rejected by the Oklahoma Supreme Court. For this reason, since the fundamental question in this matter has already been ruled on by the state's highest court, it is appropriate for this court to enter an injunction enjoining the state court proceedings if the criteria of F.R.Civ.P. 65 are met. The basic issues before the court on Plaintiff's Application for Preliminary Injunction are these: 1) the substantial likelihood that movant will eventually prevail on the merits; 2) a showing that the movant will suffer irreparable injury unless the injunction issues; 3) proof that the threatened injury to movant outweighs whatever damage the proposed injunction may cause the opposing party; and 4) a showing that the injunction, if issued, will not be adverse to the public interest. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980); Wright & Miller, Federal Practice and Procedure: Civil §2948 (1973). Because this court concludes the decision of the Oklahoma Supreme Court is contrary to federal law and because the criteria for an injunction under Rule 65 and *Lundgrin* have been met, this court has enjoined the state from proceeding with

enforcement of the state gaming laws against the Quapaws and Senecas and has enjoined the Ottawa County, Oklahoma, District Court from proceeding in this matter until further notice from this court.

This nation's legal relationship with its Indian tribes has evolved over its history. Initially, Indian tribes were held to be wholly distinct nations, free from the jurisdiction of the states within which they lived. *Worcester v. Georgia*, 6 Pet. 515 (1832). In the latter part of the 19th century, a move began to assimilate the Indians into America. In 1934, this policy of assimilation was reversed and a policy of Indian sovereignty and self-determination began to emerge. *See, United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). In 1953, however, by Congressional enactment, the states were given authority to assume jurisdiction over Indian tribes in certain civil and criminal matters. Pub. L. 83-280, 67 Stat. 588, reenacted in Indian Civil Rights Act of 1968, 82 Stat. 77 (codified as amended at 25 U.S.C. §§1301-1303) (hereinafter, PL-280). *See, Kake Village v. Egan*, 369 U.S. 60, 71-75 (1962). While a policy of Indian self-governance continues, the states may assert their authority over the tribes in certain circumstances. The boundaries of this state jurisdiction are the heart of the controversy before this Court.

When Oklahoma joined the Union, its constitution had to disclaim all title to Indian lands as a prerequisite to statehood. Okla. Constitution, Art. I, §3. The Enabling Act which permitted Oklahoma to draft a constitution also contained a disclaimer to Indian land. Act of June 16, 1906, 34 Stat. 267.

In 1953, when PL-280 was enacted, Congress removed the barrier to state jurisdiction over Indian tribes posed by the disclaimer provision in the state Enabling Acts. 25 U.S.C. §1324. PL-280 granted five, and ultimately six, states jurisdiction over Indian tribes. A provision of the law permitted any other state to exercise this option. States could assume jurisdiction over criminal offenses committed by or against Indians in Indian Country to the same extent that that state has jurisdiction over offenses committed elsewhere in the state. PL-280 §§ 2(a) and 6. States could assume jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in Indian Country to the same extent that a state has jurisdiction over other civil causes of action. PL-280 §§ 4(a) and 6. In order to claim such jurisdiction, a state had to "remove any legal impediment to the assumption of civil and criminal jurisdiction. . . ." PL-280, § 6. The states were required to remove constitutional barriers to jurisdiction, "where necessary," and to assert jurisdiction by "affirmative legislative action. " PL-280, §7. When PL-280 was amended in 1968, this latter requirement was removed, but a requirement of Indian consent to jurisdiction was added. 15 U.S.C. §1322(a). Oklahoma did not claim jurisdiction as permitted under PL-280 as originally enacted and has not sought tribal consent to jurisdiction under the amended Act. *Seneca-Cayuga, supra* at 88.

Nevertheless, the Oklahoma Supreme Court holds that even though Oklahoma has not followed the procedures of PL-280 of removal of its constitutional disclaimer and has not taken other affirmative legislative action to assert jurisdiction in Indian Country, the state

may exercise "residuary jurisdiction" on Indian land. Until *Seneca-Cayuga,* the concept of "residuary jurisdiction" did not appear in Oklahoma case law. The Oklahoma Supreme Court said residuary jurisdiction "is used to invest state courts with jurisdiction interstitially when the subject-matter of cognizance does not infringe upon tribal self-government and has not been pre-empted by congressional legislation." *Seneca-Cayuga* at 88. One commentator has termed the court's reasoning "obscure and confused." C. Goldberg-Ambrose, *Public Law 280 – From Termination to Self-Determination,* Paper presented at a seminar entitled "The American Indian in Contemporary Life: An examination of Relationships Between Cultural Values and American Indian Policy," February 21-22, 1985, at the University of California at Los Angeles American Indian Studies Center.

In finding residuary jurisdiction, the court relied on *Three Affiliated Tribes v. Wold Engineering,* 467 U.S. 138 (1984), but *Wold* is inapplicable to this case for two reasons: First, *Wold* concerned a case where an Indian tribe sought to avail itself of state courts to pursue a claim against a non-Indian for activities occurring on Indian land. The Supreme Court has repeatedly approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian Country. *Id.* at 148. In the instant case, however, the state, over the protests of Indian tribes, seeks to enforce its bingo laws against Indians on Indian land. "State law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress." F. Cohen, Handbook of Federal

Indian Law, 259 (1982). The second reason *Wold* is inapplicable to this case is that there is no basis for the residuary jurisdiction Oklahoma claims. In *Wold*, the Supreme Court held that PL-280 does not divest a state of jurisdiction lawfully obtained before that Act was passed. *Wold* concerned a North Dakota Supreme Court decision that held that a state court did not have jurisdiction over a civil lawsuit by an Indian tribe against a non-Indian for activities occurring on Indian land. In 1957, the North Dakota Supreme Court made a broad claim to state jurisdiction in Indian country. In *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957), the court held that the disclaimers to Indian land contained in the North Dakota Enabling Act and state Constitution foreclosed civil jurisdiction over Indian Country only in cases involving interests in Indian lands themselves. In 1963, the North Dakota Supreme Court held that a state statute enacted pursuant to PL-280 disclaimed all state jurisdiction in Indian Country absent Indian consent. *In re Whiteshield*, 124 N.W.2d 694 (N.D. 1963). In *Wold*, the U. S. Supreme Court held that PL-280 did not require North Dakota "to disclaim the basic jurisdiction recognized in *Vermillion* or authorized it to do so." *Wold* at 150. "Nothing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." *Id*. However, while North Dakota had asserted a broad claim to jurisdiction in Indian Country, no such claim has been made by Oklahoma. While *Wold* holds that PL-280 does not divest a state of pre-existing and lawfully obtained jurisdiction, it provides no basis for a state which has made no such jurisdictional claim to accomplish by silence

what Congress intended it to do under the terms of PL-280. PL-280 permits states to assume jurisdiction over civil suits between Indians and over criminal matters where an Indian is the perpetrator or victim of the crime. PL-280 §§2(a) and 4(a). The Act expressly excludes certain forms of state jurisdiction: regulatory jurisdiction, taxing authority and jurisdiction over hunting and fishing rights. PL-280 §§2 (b) and 4 (b). The implication of PL-280 is clear: To the extent a state seeks to assert jurisdiction over civil and criminal matters on Indian land, it must do so under the Act, while any attempt to assert taxing or regulatory authority or assert jurisdiction over hunting and fishing rights is impermissible. *See*, Goldberg-Ambrose, *supra*.

Oklahoma's bingo laws may be classified as either regulatory or criminal. For example, 21 Okl.St.Ann. §995.3 specifies the manner in which one may obtain a license to conduct bingo games and §995.10 places limits on the number of bingo sessions which may be held per day and per week and also limits the size of cash prizes which may be awarded in a single game and in a single session. Section 995.15 makes violation of the bingo laws, except as otherwise provided, a misdemeanor. While the Oklahoma Supreme Court found no useful distinction between "civil regulatory" and "criminal prohibitory" bingo laws, the distinction is significant for purposes of PL-280. To the extent that Oklahoma's bingo laws are criminal statutes, failure to comply with PL-280 means the State may not have authority to enforce them in Indian Country, unless a prior valid transfer of jurisdiction occurred. *Cf., Kennerly v. District Court*, 400 U. S. 423, 425-430 (1971). Failure to assume jurisdiction under

PL-280 has been cited as an indication that the state lacks the jurisdiction it seeks to claim. Cohen, *supra*, at 367; *see, Fisher v. District Court*, 424 U. S. 382, 388 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-78 (1973). A number of states have held that failure to accept jurisdiction under PL-280 precludes a state from asserting that jurisdiction in Indian Country. *See*, Cohen at 367 and cases cited therein. Indeed, this has been the law in Oklahoma. *State v. Burnett*, 671 P.2d 1165 (Okl.Cr. 1983); *State v. Littlechief*, 573 P.2d 263 (Okl.Cr. 1978)(*adopting, U.S. v. Littlechief*, No. CR-76-207-D (W.D.Okl. November 7, 1977)); *C.M.G. v. State*, 594 P.2d 798, 799 (Okl.Cr.), *cert. denied*, 444 U.S. 992 (1979). Further, to the extent that Oklahoma's bingo laws are regulatory in nature, the state may be precluded by PL-280 from seeking to enforce them in Indian Country. *See, Bryan v. Itasca County*, 426 U.S. 373, 384 and 388 n. 14 (1976); *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) (By defining the limits of the jurisdiction granted to the states, PL-280 "necessarily pre-empts and reserves to the Federal government or the tribe jurisdiction not so granted.") *See also*, Goldberg-Ambrose, *supra*.

The *Seneca-Cayuga* decision is misguided for other reasons, as well. The Court relied on U.S. Supreme Court cases permitting state jurisdiction over non-Indians in Indian country. [*E.g. Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976)], and extended their application to a situation where state jurisdiction is aimed at Indian conduct in Indian Country which affects non-Indians. In so doing, the court "allowed state jurisdiction to seep into the area

preempted by Public Law 280." Goldberg-Ambrose, *supra*. The focus of Oklahoma's bingo laws is the *conduct* of the games. The laws do not make participation in bingo an offense. Thus, the laws are clearly aimed at the actions of the Indian tribes in Indian Country, not the conduct of non-Indian or non-tribe members. *See, Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (9th Cir. 1986). In such a situation, the State must assume jurisdiction under PL-280, if at all.[2] *See, Kennerly, supra*, at 425-26; Cohen at 367.

Finally, even assuming that Oklahoma could, under proper circumstances, assert jurisdiction over the Indian bingo operations herein, a balancing of tribal, state and federal interests is required to determine if state jurisdiction is proper. Determination of whether the assertion of state authority is pre-empted calls for a "particularized inquiry into the nature of the state federal tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The Oklahoma Supreme Court undertook a balancing of interests in this matter, but erroneously gave little or no weight to tribal and federal interests while overvaluing ill-defined state interests. The court failed to view the tribal interests in self-determination and economic development against the backdrop of existing federal policy and interests in encouraging Indian

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[2] Perhaps the above, coupled with the Stipulation of Facts of the parties, leaves little for trial on the merits, but this remains to be seen as there may be additional facts to bring before the Court at trial.

self-sufficiency. The President's statement on Indian policy indicates that encouraging Indian economic development is a major part of that policy. *Statement by the President: Indian Policy,* The White House, January 24, 1983. Indian bingo has been recognized as a means of supporting this federal policy, and the Secretary of the Interior has indicated that he would "strongly oppose" efforts to subject Indian bingo operations to state regulatory laws. *Cabazon, supra,* at 904-905. Clearly, current federal policy is to encourage tribal self-government and economic development. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). Such policy should weigh heavily in this balancing of interests.

The Quapaws and Senecas also have compelling interests at stake. The Indian bingo operations provide a major source of revenue to fund essential tribal services and are a significant source of employment for tribal members. *See,* Findings of Fact 3(J)(stipulated by the parties). In addition, since revenue raising is a traditional governmental function, the bingo operations are clearly a part of the tribes' process of self-government. *See, Cabazon, supra,* at 906. The Oklahoma Supreme Court erroneously found little infringement upon tribal sovereignty by enforcement of the state's bingo laws because it was "unable to ascertain that bingo is a traditional tribal activity or one involving essential tribal functions." *Seneca-Cayuga* at 90.

The Oklahoma Supreme Court offered little guidance to the lower court as to what state interests were involved in determining whether the state could properly assert jurisdiction over Indian bingo. The court noted that

"states have a legitimate interest in preventing infiltration of organized crime," *Seneca-Cayuga* at 91, but federal criminal law would apply to any such organized crime offenses. *See, United States v. Farris,* 624 F.2d 890, 893 (9th Cir. 1980) (federal laws generally applicable throughout the United States apply with equal force to Indians in Indian Country). Under the Assimilative Crimes Act, 18 U.S.C. §13, a state's prohibitory, but not regulatory, laws can be enforced by the federal government in Indian Country. *Id.* at 897; *U.S. v. Marcyes,* 557 F.2d 1361, 1364 (9th Cir. 1977). Thus, concern regarding organized crime is a matter for federal authorities.

The Oklahoma Supreme Court also noted that the State has an interest in "protecting the State's overall economy and tax base," *Seneca-Cayuga* at 91, but the court failed to explain how the mere possibility that Indian bingo could "siphon off needed state revenues" was adequate justification for enforcing its criminal laws in Indian country. *See, Seneca-Cayuga* at 90-91. Under these circumstances, there is no adequately defined state interest which can outweigh the fundamental tribal and federal interests which would be undermined by allowing the State to assert jurisdiction over the Indian bingo operations herein. For these reasons, and based on the Court's Findings of Fact and Conclusions of Law entered herein, the Movants' Application for Preliminary Injunction was granted.

II. FINDINGS OF FACT

1. Plaintiff tribes are Indian tribes with governing bodies recognized by the Secretary of the Interior and the

matter in controversy arises under the Constitution, laws and treaties of the United States.

2. Plaintiff tribes seek to redress alleged deprivations under color of state law of their rights, privileges and immunities under the Constitution.

3. The parties have stipulated to the following:[3]

A. Members of the Quapaw and Seneca-Cayuga tribes are citizens of the United States and the State of Oklahoma.

B. That while gambling is a traditional Indian function, Bingo has only been operated by Tribes in the past decade.

C. The buildings in which bingo operations are held and are to be held are used exclusively for bingo and are on land held in trust for the tribes by the United States.

D. The Seneca-Cayuga Tribe operates bingo games three days or more per week and on Sundays and all or most games are in violation of State of Oklahoma statutes. The Quapaw bingo operations are not expected to comply with Oklahoma regulations on size of prizes or days of operation. The Quapaw bingo operation is expected to comply with all applicable federal and tribal laws and regulations.

E. The customers of the Seneca-Cayuga bingo games are predominantly non-Indian and non-Seneca-

[3] The parties stipulated extensively to both testimonial and documentary evidence in addition to that set forth herein.

Cayuga. The customers of the Quapaw bingo games will be predominantly non-Indian or non-Quapaw.

F. The Quapaw tribe estimates the bingo hall will provide employment for more than sixty tribal members.

G. Close to 50 percent of employable members of the Quapaw tribe are unemployed. More than 25 to 30 percent are on public assistance.

H. Of the 700 members of the Seneca-Cayuga tribe living in the immediate area, approximately 350 live below the poverty level. The rate of employment within the tribe is about 35 percent.

I. The Quapaws operated a variety of programs for the health and welfare of tribe members, including a community health outreach program, programs for the elderly, housing improvement programs and education programs. The Seneca-Cayuga tribe is affiliated with a number of health and welfare programs including, Indian Health Clinic serving some 28,600 cases per year, a housing authority providing 250 low rent units and 236 home acquisition units, a hot meal program for the elderly, an Indian Child welfare program, a summer youth employment program and an adult education program.

J. The Seneca-Cayuga bingo operation is wholly owned and operated by the tribe. It produces an average net income of $312,000 per year and employs 20 tribe members. The income from the bingo operation subsidizes the various tribal programs outlined above (I).

K. Quapaw tribal programs are severely limited by lack of available funds and federal cutbacks have intensified the situation.

L. If not delayed by litigation, the Quapaws expect to open their bingo operation within 30 days. The tribe estimates the bingo operations will provide several hundred thousand dollars a year to fund tribal programs.

4. Current federal policy is to promote Indian self-government and economic self-sufficiency. [See discussion of the President's Statement on Indian Policy and remarks by the Secretary of the Interior, *supra* 14.]

5. Enforcement of the Oklahoma bingo laws to bingo operations of the Quapaw and Seneca-Cayuga tribes would have a chilling effect on those operations, reduce revenue to the tribe needed to support essential services, necessitate expenditure of significant amounts of money for litigation costs and cost the tribes a significant number of needed jobs.

6. Enjoining the State from enforcing its bingo laws in Indian Country would cause minimal harm to the State, since the State has identified no significant cognizable interest at stake.

7. The public interest favors a policy of encouraging Indian self-government and economic self-sufficiency.

8. The Oklahoma bingo laws at issue, 21 Okl.St.Ann. §951.1 *et seq*. regulate the operation of bingo, but do not make participation in bingo a crime.

III. CONCLUSIONS OF LAW

1. This Court has jurisdiction of this matter by virtue of 28 U.S.C. §§1331, 1343(a)(3) and 1362.

2. Any Finding of Fact properly characterized a Conclusion of Law is incorporated herein.

3. Indians were once held to be free from state jurisdiction, *Rice v. Olson*, 324 U.S. 786, 789 (1945); *Worcester v. Georgia*, 6 Pet. 515 (1832), but it is no longer the law that state laws can have no force in Indian Country. *See, Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1982).

4. Indian tribes are unique aggregations possessing "attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, *quoting United States v. Mazurie*, 419 U. S. 544, 557 (1975). Tribes retain any aspect of their historical sovereignty "not inconsistent with the overriding interests of the National Government," *Washington v. Confederated Tribes, supra* at 153, including the power of regulating their internal and social relations. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), cited in *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

5. Absent governing Acts of Congress, a state may not act in a manner which infringes on the right of reservation Indians to make their own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217, 219-220 (1959).

6. PL-280 is a "governing Act of Congress," *Kennerly, supra*, at 427, which establishes the manner in

which states may assume jurisdiction over civil and criminal matters in Indian country.

7. Oklahoma did not amend its constitution or take other "affirmative legislative action" to assume jurisdiction in Indian Country under the original version of PL-280. Oklahoma has not sought tribal consent to state jurisdiction over Indian Country under the amended version of PL-280. *Seneca-Cayuga* at 87-88. Therefore, Oklahoma has not assumed civil or criminal jurisdiction in Indian Country pursuant to PL-280.

8. Absent Congressional authority, the determination of whether state laws are enforceable in Indian country requires a "particularized inquiry" into "the nature of state, federal, and tribal interests at stake." *Cabazon, supra, (quoting Bracker, supra,* at 142). Under this inquiry, state laws may not be applied to Indian Country if this application would (1) interfere with Indian self-government, or (2) impair a right granted or reserved by federal law. *Cabazon* at 903; *Rice v. Rehner,* 463 U.S. 713, 718 (1983) (*quoting, McClanahan, supra,* at 172).

9. There exists a strong federal policy to encourage and foster tribal self-government and to promote Indian economic development. *Mescalero, supra,*at 324; *Statement by the President: Indian Policy, supra. See,* discussion in Introduction at page 14.

10. Oklahoma's bingo laws regulate the *operation* of certain types of gambling, but do not make it a crime to *participate* in the gambling activity. Therefore, the laws are directed at the conduct of Indians in Indian Country, not the conduct of non-Indians. *See, Cabazon* at 904.

11. For a preliminary injunction to issue, four criteria must be met: 1) likelihood that movant will prevail on the merits; 2) the possibility of irreparable harm to movant if the injunction is not issued; 3) the balance between the harm and the injury that granting the injunction would inflict on defendants; and 4) public policy. *Lundgrin v. Claytor,* 619 F.2d 61, 63 (10th Cir. 1980).

12. For the reasons set forth in the Introduction, *supra,* the Court concludes that there is substantial likelihood that the Plaintiffs herein will prevail on the merits in contending that the Oklahoma bingo laws do not apply in Indian Country.

13. The Court concludes that the Plaintiffs will suffer irreparable injury if an injunction is not issued. Enforcement of the State's bingo laws would have a chilling effect on the Indian bingo operations, cost the tribes significant sums of money for litigation, reduce revenue needed for essential tribal services and cost a significant number of jobs for tribe members.

14. The Court concludes that the harm to the Indian tribes if an injunction is not issued far outweighs the potential harm to the State if an injunction is issued. The State has identified no substantial interest which will be adversely affected by an injunction.

15. The Court concludes that granting an injunction will serve the public interest by fostering the announced public policies of allowing Indian tribes to make their own laws and be governed by them and encouraging tribal self-reliance through economic development.

For these reasons, the Court concludes that Ottawa County, Oklahoma, District Court Judge Jon D. Douthitt should be enjoined from proceeding with any further action in this matter and that the District Attorney and Sheriff of Ottawa County, Oklahoma, and their assistants and employees, should be enjoined from seeking to enforce the Oklahoma bingo laws in the Indian Country herein.

This matter is set for trial on September 22, 1986, at 9 a.m. Any additional parties are to be added by June 13, 1986. The parties are to exchange the names and addresses of all witnesses, including expert witnesses, by June 27, 1986. A brief description of the testimony of any witness whose deposition has not been taken should be included. Deadline for discovery is July 11, 1986. Dispositive motions should be filed by July 28, 1986, and responses thereto by August 8, 1986. An agreed pre-trial order should be filed by September 8, 1986, and proposed Findings of Fact and Conclusions of Law by September 15, 1986.

DATED this 5th day of June, 1986.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX E

25 U.S.C. 1321

ASSUMPTION BY STATE OF CRIMINAL JURISDICTION

(a) Consent of United States; force and effect of criminal laws

The consent of the United States if hereby given to any State not having jurisdiction over criminal offenses committed by or agent Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian Country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian Country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian Country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation and use of property; hunting, trapping, or fishing.

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or

shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

APPENDIX F

25 U.S.C. 1322

ASSUMPTION BY STATE OF CIVIL JURISDICTION

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State now having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian Country situated within such State to assume, with the consent of the tribe occupying the particular Indian Country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian Country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian Country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use and probate of property.

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinance or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in this determination of civil causes of action pursuant to this section.

APPENDIX G

25 U.S.C. 1323.

RETROCESSION OF JURISDICTION BY STATE

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

---

(3)

No. 88-266

In The

Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION, *PETITIONER,*

v.

JAN GRAHAM, *et al., RESPONDENT.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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COUNSEL FOR RESPONDENTS

* Counsel of Record

Petition for Certiorari Filed August 5th, 1988
Certiorari Granted October 3rd, 1988

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

State of Oklahoma, *ex rel* Oklahoma Tax Commission	)	Plaintiff
vs.	)	No. 85-663-C
Jan Graham and Chickasaw Nation by and through Overton James, Governor of the Chickasaw Nation	)	Defendant

PETITION FOR REMOVAL

To: The Honorable Judges of the United States District Court for the Eastern District of Oklahoma.

1. The petitioners, Chickasaw Nation of Oklahoma and Jan Graham are the defendants in the above entitled matter.

2. On the 13th day of October, 1985, the above entitled action was commenced against petitioners herein in the District Court of Murray County, Oklahoma entitled "State of Oklahoma, *ex rel* Oklahoma Tax Commission v. Jan Graham and Chickasaw nation, by and through Overton James, Governor of the Chickasaw Nation, No. C-85-223 seeking temporary and permanent injuntive relief to prevent the petitioners from conducting bingo games and selling untaxed tobacco products on Tribal Trust properties. Copies of the pleadings filed in said case are hereto attached.

3. The above entitled action is a civil action which this court has jurisdiction under 28 U.S.C. 1331 and is one that may be removed to this court pursuant to the provisions of 28 U.S.C. 1441, in that:

(a) Petitioner, Chickasaw nation of Oklahoma is a federally recognized and protected tribe of Indians whose principal offices are situated in Ada, Oklahoma. Petitioner, Jan Graham, is an employee of the tribe.

(b) The plaintiff in the State Court action herein above set forth

is attempting to interfere with the tribe's right to self govenment and its rights to sovereign immunity from suits in state courts.

(c) This action rises out of the constitution, laws and treaties of the United States and requires a determination of whether the courts of the State of Oklahoma may exercise jurisdiction over the Chickasaw Nation and its employee's in the conduct of the Tribe's affairs and self government without the consent of the tribe and the United States Congress.

4. Pursuant to 28 U.S.C. 1446 and Rule 25, Rules of the United States District Court for the Eastern District of Oklahoma, petitioners present and file herewith a bond with good and sufficient surety in the amount of $500.00 conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings sought, should it be determined that the above entitled action was improperly removed.

5. This petition is filed with this court within 30 days after this cause became removable.

Wherefore, Petitioners pray that the above entitled action be removed from the District Court of Murray County, Oklahoma to this Honorable Court.

Date this the 22th day of October, 1985.

KILE AND RABON
P.O. Box 726
Hugo, Oklahoma 74743

Attorneys for Petitioners

By Bob Rabon

Certificate of Service Omitted in Printing

IN THE DISTRICT COURT OF MURRAY COUNTY
STATE OF OKLAHOMA

State of Oklahoma, *ex rel*	)	
Oklahoma Tax Commission,	)	
Plaintiff	)	
	)	
vs.	)	Case No. C-85-223
	)	
Jan Graham and Chickasaw Nation	)	
by and through Overton James, Governor	)	
of the Chickasaw Nation,	)	
Defendant	)	

PETITION

COMES NOW the State of Oklahoma, ex rel the Oklahoma Tax Commission, and for its cause of action against Earl d. Guinn and the Chickasaw Nation, hereinafter called Defendants, alleges and states as follows:

(1) The Defendant, Chickasaw Nation, operates a business within Murray County, Oklahoma, located at 1001 West First Street, Sulphur, Oklahoma, said business is known as The Chickasaw Motor Inn and Restaurant.

(2) Defendant, JAN GRAHAM is the manager of the Chickasaw Motor Inn and Restaurant.

(3) Since on or about August 23, 1985, in the operation of said business, the Defendants have sold and continue to sell at retail a large quantity of cigarettes to the general public upon which State taxes have not been paid by reason of the Defendants' refusal to affix cigarette excise tax stamps to the individual packages of cigarettes in violation of State law, 68 O.S. §§306, 316. Defendants have also failed and refused to collect or remit State sales taxes on the sale of said cigarettes as required by State law, 68 O.S. §1354, 1361.

(4) The Defendants have failed and refused to file any reports with the Oklahoma Tax Commission regarding the receipt of unstamped cigarettes and the sale of cigarettes as is required by State law, 68 O.S. §§312, 1362.

(5) Since on or about November 1, 1984, in the operation of

said business, the Defendants have operated and continue to operate bingo games upon which State sales taxes have not been paid on the gross receipts from said games by reason of the Defendant's failure and refusal to collect and remit sales taxes in violation of State law, 68 O.S. §1354, 1361.

(6) The Defendants have failed and refused to file complete and accurate reports with the Oklahoma Tax Commission concerning its gross receipts from the operation of The Chickasaw Motor Inn and restuarant as required by State law. 68 O.S. §1365.

(7) The calim of the State for taxes is in danger of being lost or rendered uncollectible by reason of dissiptation or concealment of the property by the Defendants, thereby causing irreparable harm and injury to the Plaintiff.

(8) The actions of the Defendants constitute a continuing viiolation of the statutes herein cited, which violation constitutes irreperable injury to the State and its citizens, for which Plaintiff is entitled to temporary and permanent injunctions.

WHEREFORE, Plaintiff prays for an order against said Defendants, their agents, servants and employees:

(1) Permanently enjoining and restraining them from receiving or selling within the State untaxed and unstamped cigarettes in violation of the laws of the State of Oklahoma;

(2) permanently enjoining and restraining them from operating bingo games on which State sales taxes are not collected in violation of the laws of the State of Oklahoma;

PLAINTIFF FURTHER PRAYS for an Order against said Defendants, their agents, servants and employees:

(1) Preliminarily enjoining them from possessing or selling, within this State, untaxed and unstamped cigarettes in violation of the laws of the State of Oklahoma until all taxes, penalties and interest are paid in full to the State of Oklahoma in conenction with the receipt and sale of said cigarettes; and, until such reports as are required by State law have been filed; and, until a hearing can be held on the Plaintiff's request for a permanent injunction;

(2) Preliminarily enjoining them from conducting bingo games on which State sales taxes are not collected and remitted on the gross proceeds therefrom until a hearing can be held on the Plaintiff's request for a permanent injunction.

(3) Preliminarily enjoining them from conducting any business

at The Chickasaw Motor Inn and Restaurant until complete and accurate reports are filed with, and taxes paid to, the Oklahoma Tax Commission as required by State law.

PLAINTIFF FURTHER PRAYS that an Order of the Court be granted forthwith, against said Defendants, their agents, servants and employees temporarily restraining them from selling untaxed and unstamped cigarettes, and from conducting any bingo games upon which State sales taxes are not collected and remitted on the gross proceeds therefrom in violation of the laws of the State of Oklahoma, until a hearing can be held on the Plaintiff's request for a preliminary injunction.

STATE OF OKLAHOMA, ex rel
OKLAHOMA TAX COMMISSION

J. LAWRENCE BLANKENSHIP
GENERAL COUNSEL

BY: Robert C. Jenkins
Robert C. Jenkins, OBA #4641
Attorneys for Plaintiff
2501 N. Lincoln Boulevard
Oklahoma City, OK 73194
(405) 521-3141

Verification Omitted in Printing
Summons issued to Defendants Omitted in Printing

IN THE DISTRICT COURT OF MURRAY COUNTY
STATE OF OKLAHOMA

State of Oklahoma, *ex rel* Oklahoma Tax Commission, Plaintiff,	)	
vs.	)	Case No. C-85-223
Jan Graham and Chickasaw Nation by and through Overton James, Governor of the Chickasaw Nation, Defendants.	)	

TEMPORARY RESTRAINING ORDER

On the 18th day of October, 1985, the Plaintiff State of Oklahoma, ex rel Oklahoma Tax Commission filed a verified Petition in the District Court of Murray County, State of Oklahoma, alleging that the Defendants, their agents, servants and employees have sold and continue to sell a large quantity of cigarettes to the general public in Murray county, Oklahoma upon which State taxes have not been paid; and further alleging that the Defendants, their agents, servants and employees have operated and continue to operate bingo games on which sales taxes have not been colelcted and remitted to the Oklahoma Tax Commission, and, asking that the Defendants, Jan Graham and Chickasaw Nation, be temporarily enjoined from selling untaxed and unstamped cigarettes and from conducting any bingo games upon which State sales taxes are not collected and remitted on the gross proceeds therefrom, in violation of the laws of the State of Oklahoma, until a hearing can be held on the Plaintiff's request for a preliminary injunction; and it appearing that the said Plaintiff will suffer irreparable damage and injury unless the said Defendants are restrained forthwith and without notice:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendants, Jan Graham and Chickasaw nation, their agents, servants and employees are hereby temporarily restrained and enjoined from selling unstamped and untaxed cigarettes, and from operating any bingo games upon which State sales taxes are not collected and remitted on the gross proceeds therefrom, in violation of the laws of

the State of Oklahoma until the Court can consider the Plaintiff's request for a preliminary injunction;

IT IS FURTHER ORDERED that a hearing on the Plaintiff's request for a preliminary injunction will be held on the 1st day of November, 1985, at 9:00 o'clock a.m. in the Murray County Courthouse, at which time the Defendants may appear to show cause, if any, why they should not be preliminary enjoined and restrained as prayed for in Plaintiff's Petition.

Dated the 18th day of Octboer, 1985.

/s/ Stanley Anderson
JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

State of Oklahoma, *ex rel* Oklahoma Tax Commission, Respondent [Plaintiff],	)	
vs.	)	No. 85-663-C
Jan Graham and Chickasaw Nation by and through Overton James, Governor of the Chickasaw Nation, Petitioner [Defendant].	)	

MOTION TO REMAND

COMES NOW the State of Oklahoma, ex rel., Oklahoma Tax Commission, and respectfully requests this Court to remand the above styled cause aginst the Respondent, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted and Rule (12(b) (1) of the Federal Rules of Civil Procedure for lack of jurisdiction over the subject matter. Grounds for this Motion are more fully set forth in the memorandum brief accompaning this Motion.

Respectfully submitted,

STATE OF OKLAHOMA, ex rel.,
OKLAHOMA TAX COMMISSION

J. LAWRENCE BLANKENSHIP
General Counsel

By: **Robert C. Jenkins**
Robert C. Jenkins, OBA #4641
Attorney for Respondent
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194
(405) 521-3141

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

State of Oklahoma, *ex rel* Oklahoma Tax Commission,	)	Respondent [Plaintiff],
vs.	)	No. 85-663-C
Jan Graham and Chickasaw Nation by and through Overton James, Governor of the Chickasaw Nation,	)	Petitioner [Defendant].

MOTION TO DISMISS

Comes now the defendant and pursuant to Rule 12 (b) of the Rules of Civl Procedure for the United States District Court and respectfully moves the Court to dismiss the action for the lack of jurisdiction.

Kile and Rabon
114 N. Second St.
Hugo, Okla. 74743

Attorneys for Defendants

By: Bob Rabon

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Order of the United States District Court for the Eastern District of Oklahoma denying motion to remand entered on February 27, 1986 is printed in the petition for certiorari at page A-25.

11

Order of the United States District Court for the Eastern District of Oklahoma granting motion to dismiss entered on February 27, 1986 is printed in the petition for certiorari at page A-27.

Order of the United States District Court for the Eastern District of Oklahoma denying motion for new trial entered on March 27, 1986 is printed in the petition for certiorari at page A-31.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

State of Oklahoma, *ex rel.*, Oklahoma Tax Commission, Appellant,	)	
v.	)	No. 86-1655
Jan Graham, *et al.*, Appellee.	)	

TWO DEEDS ATTACHED TO OKLAHOMA TAX COMMISSION'S OPENING BRIEF WHICH WAS FILED IN THE TENTH CIRCUIT COURT OF APPEALS ON AUGUST 6, 1986

Book 194 Page 72 155524

DEED

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

KNOW ALL MEN BY THESE PRESENTS

THAT the ECONOMIC DEVELOPMENT ADMINISTRATION, United States Department of Commerce, Main Commerce Building, Washington, D.C., for and in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) and other good and valuable consideration to the undersigned paid by the Grantee herein named, the receipt of which is hereby acknowledged, has GRANTED, SOLD and CONVEYED, and by these presents does GRANT, SELL AND CONVEY unto the CHICKASAW NATION OF OKLAHOMA, all of the following described real property in Murray County, Oklahoma, to-wit:

All of Lots Eleven (11), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Twenty-nine (29), Thirty (30), Thirty-one (31), Thirty-two (32), Thirty-three (33), Thirty-four (34), Thirty-five (35), Thirty-six (36), Thirty-seven (37), and Thirty-eight (38), in Block One Hundred Fifty-six (156), in the City of Sulphur, Oklahoma, according to the Re-Subdivision thereof, Murray County, Oklahoma;

and the following described personalty situated and being in Murray County, Oklahoma, to-wit:

All furnishings, fixtures, machinery and equipment including, but not limited to, desks, chairs, tables, beds, televisions and radio sets, office machines, cash registers, kitchen equipment and supplies, linens, etc., used in connection with the operation and maintenance of the Sulphur Community Inn, Inc., d/b/a Artesian Motor Hotel.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in

anywise belonging, unto the said Chickasaw Nation of Oklahoma and its assigns forever; and the undersigned does hereby bind itself, its usccessors and assigns to warrant and forever defend all and singular the said premises unto the said Chickasaw Nation of Oklahoma and its assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

EXECUTED this 24th day of August A.D., 1972.

ECONOMIC DEVELOPMENT ADMINISTRATION
United States Department of Commerce

By: Millard K. Neptune
Millard K. Neptune
Regional Director
Southwestern Regional Office

Acknowledgment Omitted in printing.

Book 301 Page 440 102717

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS

That The Chickasaw Nation of Oklahoma, P.O. Box 1548, Ada, OK 74820 *of* Pontotoc *County, State of Oklahoma, party of the first part, in consideration of the sum of* Ten and No/100 ---------- *Dollars, in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, and convey unto* The United States of America in Trust for the Chickasaw Nation *party of the second part, the following described real property and premises, situated in* Murray *County, State of Oklahoma, to wit:*

Lots 11, 12, 13, 14, 15 and 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38 in Block 156, City of Sulphur, Oklahoma, according to the Re-Subdivision thereof.

together with all improvements thereon and appurtenances thereunto belonging, and warrant title to the same, subject to any valid, existing lease or right-of-way thereon.

It being understood that the hereinabove described lands are purchased pursuant to the provisions of Section 5 of the Act of June 18, 1934 (48 Stat. 984), and Section 1 of the Oklahoma Act of June 26, 1936 (49 Stat. 1967), and said lands are non-taxable to the extent therein provided.

To have and to hold said described premises unto the said party of the second part, and assigns, forever free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature.

Signed and delivered this 23 day of August, 1985

Witnesses:

Bill Anoatubby
Lieutenant Governor, Chickasaw Nation

Overton James
Governor, Chickasaw Nation

Robert R. Stephens
Chairman, Chickasaw Tribal Legislature

Acknowledgment omitted in printing

The Opinion of the United States Court of Appeals for the Tenth Circuit entered on June 26, 1987 is printed in the petition for certiorari at page A-9.

18

The Order of the Supreme Court of the United States entered on December 7, 1987 is printed in the petition for certiorari at page A-8.

19

The Opinion of the United States Court of Appeals for the Tenth Circuit entered on May 18, 1988 is printed in the petition for certiorari at page A-1.

20

The Constitution of the Chickasaw Nation is printed in the brief opposing certiorari at page App. 1.

21

The Chickasaw Nation Gaming Act is printed in the brief opposing certiorari at page App. 29.

No. 88-266

In The

Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION, *Petitioner,*

v.

JAN GRAHAM, *et al., Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE OKLAHOMA TAX COMMISSION

STANLEY J. ALEXANDER, OBA #198
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Oklahoma Tax Commission
2501 Lincoln Boulevard
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Attorneys for Petitioner

PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in determining that removal jurisdiction was proper for an action brought against an Indian tribe in state court?

2. Does tribal sovereign immunity prohibit an action brought by the State to enforce the collection and remittance requirements of its tax laws on commercial activities conducted by an Indian tribe on off-reservation lands?

LIST OF PARTIES

The Petitioner is the State of Oklahoma, ex rel., Oklahoma Tax Commission.

The Respondents are Jan Graham and the Chickasaw Nation.

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No. 88-266

In The
Supreme Court of the United States
OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION, ***Petitioner***

v.

JAN GRAHAM, ***et al., Respondents.***

BRIEF FOR THE OKLAHOMA TAX COMMISSION

OPINIONS BELOW

The Order and judgment of the Court of Appeals entered on May 18, 1988, is reported at 846 F.2d 1258. The Order of the Court of Appeals entered on June 26, 1987, is reported at 822 F.2d 951, vacated by this Court at 108 S.Ct. 481 on December 7, 1987 (Case No. 87-635). The Orders of the United States District Court for the Eastern District of Oklahoma entered on February 27th, 1986 are unreported. All of these Orders are contained in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Order of the Court of Appeals was entered on May 18, 1988 and the Petition for writ of certiorari was filed on August 5, 1988 and docketed in this Court on August 12, 1988. The Petition was granted on October 3, 1988.

STATUTES INVOLVED

Title 28 United States Code §1441(a) and (b) provides for removal jurisdiction in federal courts. Title 25 United States Code §§465 and 501 provides authority for the Federal Government to hold title to land in trust for Indian Tribes.

Title 68 Oklahoma Statutes §§301 and 1354 levy the State's cigarette and sales taxes respectively and §232 of Title 68 provides for injunction proceedings for violation of State tax laws. All of these statutes are reproduced in the Appendix to the Petition.

STATEMENT OF THE CASE

1. Nature of the Controversy.

The Chickasaw Nation (Tribe) conducts high stakes bingo games and sells cigarettes at a motel within the city limits of Sulphur, Oklahoma. The motel was purchased by the Chickasaw Nation from the Small Business Administration in 1972. The premises were conveyed to the United States of America in trust for the Tribe in August 1985 pursuant to the provisions of 25 U.S.C. §501 and 25 U.S.C. §465, see deeds at JA 14 and 16.

Oklahoma law requires vendors to collect and remit sales tax on bingo sales and cigarettes as well as on other items. 68 Okla. Stat. §1354. In addition, cigarette excise taxes are imposed on the consumer/user of cigarettes. 68 Okla. Stat. §§302, 302-1(a), 302-2(a) and 302-3(a). Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor and affixed to each package of cigarettes sold. 68 Okla. Stat. §302. Failure of a vendor to collect and remit state sales tax or to affix cigarette excise tax stamps to packages of cigarettes is grounds for seeking injunctive relief. 68 Okla. Stat. §232.

The Chickasaw Nation has neither collected and remitted state sales tax from its customers nor purchased and affixed state cigarette excise tax stamps to the packages of cigarettes sold.

2. The Proceedings Below.

On October 18, 1985, the Oklahoma Tax Commission (State) filed the present action in the State District Court of Murray County, Oklahoma, seeking to enjoin the Tribe pursuant to 68 O.S.A. §232 from further operating its business within the State until the Tribe complied with State tax laws, all as appears in the State's Petition in the State District Court, J.A. 3.

On October 22, 1985, the Tribe filed its Petition for removal of the case in the United States District Court for the Eastern District of Oklahoma under authority of 28 U.S.C. §1441, J.A. 1. Thereafter, the State filed its motion to remand on October 30, 1985, J.A. 8, and the Tribe motioned to dismiss on November 27, 1985, J.A. 9. The District Court ruled on these motions in Orders entered on February 27, 1986, denying the State's motion to remand, pet. for cert. page A-25 (Appendix D), and granting the Tribe's motion to dismiss, pet. for cert. page A-27 (Appendix E).

The District Court, in denying the State's motion to remand, relied on *Montana v. Blackfeet Tribe of Indians*, 471 U.S.759 (1985) and found that an action to enforce state revenue statutes against activities of a federally recognized Indian tribe raised a federal question giving the court removal jurisdiction. The District Court then granted the motion to dismiss filed by Jan Graham and the Chickasaw Nation on the grounds of tribal sovereign immunity from unconsented suit without addressing the status of the land on which the commercial activities occurred. The State's motion for reconsideration was subsequently denied by the District Court, Pet. for Cert. page A-31 (Appendix F), and the State appealed.

On appeal the Tenth Circuit affirmed the lower decisions finding "that removal was proper because of the constitutional grant of federal jurisdiction over Indian affairs," (Pet. for Cert., Page A-14) and applying reservation case law to this off-reservation situation, held that tribal sovereign immunity barred this action against both Jan Graham and the Chickasaw Nation. Pages A-15 to A-16.

The Oklahoma Tax Commission then petitioned this Court for writ of certiorari to issue in order to review the decision of the

Appeals Court. The Commission's petition was granted on December 7, 1987, and the judgment of the Appeals Court was vacated. The case was then remanded back to the Tenth Circuit for further consideration in light of *Caterpillar, Inc. v. Williams*, 482 U.S.___, 107 S.Ct. 2425 (1987).

On remand, the Tenth Circuit reasserted its previous opinion holding that removal jurisdiction was proper and the opinion in *Caterpillar* was inapposite to this case, Pet. for Cert. Page A-2. The Tenth Circuit also reaffirmed its holding that the Tax Commission's suit was barred by tribal sovereign immunity.

SUMMARY OF ARGUMENT

The original pleading filed by the State in the District Court of Murray County alleged that a business operating within the State of Oklahoma had made taxable sales upon which no tax was collected and remitted, nor any reports filed, as required by State law. This pleading contained all of the proper allegations necessary for the enforcement of State tax law by injunction.

The lower courts extinguished the jurisdiction of the State Court by denying the States motion to remand on the grounds that an Indian tribe was a party to the suit and thus a federal question was inherent in the pleading. Although the claim did not rely on federal law, the lower courts opined that the claim was an attempt to avoid the sovereign suit immunity of the Tribe and could not be properly plead without alleging that the Tribe's affirmative defense had been waived.

The lower courts used this immunity defense as the basis for federal removal jurisdiction. The State's first argument is a simple one. Removal jurisdiction is improper in this case because Congress has long since decided that federal defenses do not provide a basis for removal, *Catepillar, Inc. v. Williams*, 107 S.Ct. 2425.

After refusing to remand the case to state court, the federal courts dismissed the action grounded on the Tribe's sovereign immunity from suit. The State urges that the lower court's opinions are in conflict with the opinions of this Court which hold that the

Tribes in Oklahoma are not separate political entities with all the rights of independent status and are not exempt from laws applying alike to all state citizens, *Oklahoma Tax Commission v. United States*, 319 U.S. 598. The Indian sovereignty doctrine is not rigidly applied to cases like Oklahoma where Indians have left the reservation and become assimilated into the general community, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164. And, state authority over Indians is yet more extensive over activities not on any reserrvation, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145. In short, Tribal sovereignty is not a bar to state jurisdiction, although states must meet the modern tests for measuring infringement upon tribal self-government and federal pre-emption.

Finally, the State argues that federal statutes which are used to allocate federal, tribal and state jurisdiction within Indian country, namely 18 U.S.C. §1151 and 28 U.S.C. §1360, cannot be used by the Tribe to escape the taxing jurisdiction of the State because such an application would be violative of the principles of federalism embodied in the Tenth Amendment. Such a construction of federal law would substantially curtail the exercise of the State's taxing power within Oklahoma and impair the State's ability to function effectively in a federal system.

I. THE CASE AT BAR WAS IMPROPERLY REMOVED FROM THE STATE DISTRICT COURT.

In this case, the Oklahoma Tax Commission seeks to enforce its sales tax and cigarette tax laws against the Tribe's business enterprise. The Petition filed in State District Court by the Tax Commission, JA 3, alleges that State laws are being violated and prays for the remedy provide by State law for those violations. The face of the State's Petition is absolutely void of any reliance on federal law, which is logical in view of the fact that federal law provides no remedy for the collection of a state's taxes. Since the only remedy available to the Tax Commission is provided by State law, this action could not have been originally brought in the Federal District Court.

The Tribe's removal petition, JA 1, is allegedly grounded on

federal question jurisdiction under 28 U.S.C. §1441(a) in that the named defendant, Chickasaw Nation, is a federally recognized Indian Tribe. However, the Tribe's removal petition points to no claim within the State's original pleading which is founded upon the Constitution, treaties or laws of the United States. The Tenth Circuit so found in its opinion, Pet. Cert. A-3, that the State's complaint facially states a claim grounded on State law. Nothing in the pleading even suggests implication of a federal question, yet the lower court found that such a question is inherent within the complaint because of the parties subject to the action. No authority is cited for the Appellate Court's holding that a complaint need not rely on federal law to invoke the jurisdiction of the federal court as long as a federal question is inherent in the pleading.

However, the Appeals Court attempts to justify this holding by coupling the removal question with the Tribe's affirmative defense of sovereign suit immunity. It is upon this defense that the Tenth Circuit predicated removal jurisdiction by reasoning that the State was required to somehow anticipate this defense and overcome it in the original pleading. The State's failure to address this defense rendered the petition "not well plead" in the opinion of the Tenth Circuit and the Tribe was allowed to inject the defense as a jurisdiction basis for removal.

Whether the defense of soveriegn suit immunity is a valid defense to the State's action is discussed in the following argument. But the separate issue of federal court removal jurisdiction is governed by rules which do not permit this case to be removed from the state to the federal court. These rules were explained in this Court's opinion in *Caterpillar, Inc. v. Williams*, supra, which held that only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal question jurisdiction is governed by the "well pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

To bring a case within federal court jurisdiction, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another, *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936) at 112. In the present case, the immunity upon which federal jurisdiction is said to rest is not the basis of the State's suit because if the Tribe's claimed immunity is struck down, the State will still have to prove that taxes are owed, tax law was violated and an injunction should issue in order to vindicate the State's right to have its taxes collected. If the immunity is upheld, then the Tribe avoids liability for the tax at the outset, but the immunity created by federal law is the basis of the defendant's defense rather than the basis of the palintiff's claim. As to the enforcement of State tax law, aside from the affirmative defense, the original petition in State District Court properly alleges a cause of action.

Also, a genuine and present controversy, not merely a possible or conjectural one, must exist with reference to federal law and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or repies to a probable defense, *Gully*. On this point, the Court in *Gully* ruled:

> The federal nature of the right to be established is decisive - not the source of the authority to establish it. Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law, we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because it is prohibited thereby.

Looking upon the face of the original petition - an action by the Tax Commission to enforce its tax levy under the Oklahoma Sales Tax Code and the Oklahoma Cigarette Stamp Tax Act - a straight-forward application of the well-pleaded complaint rule precludes

original federal court jurisdiction. Oklahoma law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if the Tax Commission hs made out a valid claim for relief under state law. The well-pleaded complaint rule was framed to deal with precisely such a situation. Since 1887, it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case, *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) at 13.

In spite of these rules limiting removal jurisdiction, the Tribe contends that a federal question exists in this lawsuit because the defendant is an Indian Tribe and the Federal Government has completely pre-empted the field of "Indian law" so that any kind of suit involving the Tribe is a federal matter. The authority of this Court is opposed to this view and is illustrated in the companion cases of *McClanhan v. Arizona Tax Commission*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The *Mescalero* case is directly on point with the case at bar in that it involved a tribal business enterprise located on trust land acquired under §465 of the Indian Reorganization Act off of the Tribe's reservation in New Mexico. The Tribe was held liable for the state gross receipts tax assessment of $26,000.00 and the Mescalero's assertion that federal law completely pre-empted the field was rejected. This Court held:

> At the outset, we reject - as did the state court - the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the state court is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land. Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worchester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1932), has given way to more individualized treatment of particular treaties and specific federal statutes,

> including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. (Citations omitted) The upshot has been the repeated statements of this Court to the effect that even on reservations, state law may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law (citations omitted).

It is clear from the pronouncements of this Court in these two leading cases which have greatly shaped the area of Indian law that the federal policy does not completely pre-empt state law and therefore the federal defense of pre-emption must be heard in State Court. It is important to note that these two watershed opinions were brought to the Supreme Court from the state court systems of Arizona and New Mexico. Evidently, the Supreme Court of New Mexico has jurisdiction to enforce its State tax laws upon the Mescalero Apache Tribe, which ruling was not disturbed by this Court.

The Tenth Circuit relied heavily on the authority of *Lambert Run Coal Co. v. Baltimore and Ohio RR. Co.*, 258 U.S. 377 (1922) for their opinion that the case should not be remanded. That case, however, is readily distiguishable from the present case because in *Lambert Run*, the plaintiffs state court action sought to enjoin an Order of the Interstate Commerce Commission which regulated the allocation of railcars operated by the defendant.

The Plaintiff's petition in state court concealed the true nature of the action but when the case was removed to federal court, it became apparent that a federal agency was involved and the action was properly removed to federal court based on the federal nature of the action. In the case at bar, nothing was concealed in the State's petition, there is no federal agency involved and the Federal Government takes no responsibility or partnership in the operation of the Tribe's motel business. The Tribe is not a part or subdivision of the Federal Government nor is it controlled thereby to any greater degree than a private business or association. This view is supported by the authority in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), where the Tribe's suit to assert a claim to real property was based on federal statutes and properly brought in federal court.

At 676, this Court held:

> Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, as was the case in *Gully v. First National Bank*, 299 U.S. 109 (1936)

Just because an Indian Tribe is involved does not mean a federal question is the basis of the plaintiff's action. This Court found in *Oneida* that even an Indian Tribe must allege a federal question to sue in federal court. The status of an Indian tribe qua tribe is not enough, standing alone, to obtain federal jurisdiction. Merely because an Indian tribe maintains federal recognition or federally protected rights does not confer federal question jurisdiction because the State and all of its citizens are likewise protected by the federal government and this does not give those litigants the right to bring any claim to federal court.

Pursuant to this Court's opinion in *Caterpillar*, Congress has long since decided that federal defenses do not provide a basis for removal. Therefore, as a matter of federal law, this case should be remanded to the District Court of Murray County, State of Oklahoma. Nothing in the State's original petition in State Court would allow removal jurisdiction and it is plain error for the Tenth Circuit to rule that removal was proper in light of this Court's ruling in the above cited cases.

II. THE DECISION BELOW IMPROPERLY DISMISSED THE STATE'S CASE BASED ON TRIBAL SOVEREIGN IMMUNITY.

Under the authority of *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), requiring tribal businesses to collect state taxes, the Oklahoma Tax Commission sued to enforce the State's tax collection requirements against the Chickasaw Nation's motel business. After the Tenth Circuit affirmed removal jurisdiciton in the

federal court, it ruled that the State's claim was barred; holding that the Tribe enjoyed sovereign immunity from suit within its "territory". In its first opinion, 822 F.2d 951, printed in the pet. for cert. page A-9, the Appeals Court disposed of the issue by ruling "Although the sovereign immunity enjoyed by tribes is not absolute, we may infer state authority only where Congress has expressly provided that state laws shall apply," citing *McClanahan v. Arizona Tax Commission*, 411 U.S. at 171. The second opinion of the Tenth Circuit in this case at page A-1 in the pet. for cert., reaffirms this ruling.

The Tenth Circuit's misapplication of *McClanahan*, to this case becomes readily apparent at 411 U.S. 167-168 where this Court closely tailored the decision by explaining that *McClanahan* does not apply to situations involving Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government for example *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). At 411 U.S. 171, the Court again explains that the Indian sovereignty doctrine has not been rigidly applied in cases where Indians have left the reservations and become assimilated into the general community, for example *Oklahoma Tax Commission v. United States*.

In *Oklahoma Tax Commission v. United States*, this Court ruled the Indian citizens of Oklahoma were not exempt from a general non-discriminatory estate tax applying alike to all state citizens because of the assimilation of the Oklahoma Indians into the general community of the state as opposed to the status of reservation Indians elsewhere. The Court held at 319 U.S. 602:

> *Worchester v. Georgia*, 6 Pet. 515, held that a state might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status - a condition which has not existed for many years in the State of Oklahoma.

The Court stated on page 603 that the underlying principles on which the reservation cases are based do not fit the situation of the Oklahoma Indians. "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal automnomy as in *Worchester v. Georgia*, supra, and, unlike the Indians involved in *The Kansas Indians*, 5 Wall. 737, they are actually citizens of the

State with little to distiguish them from all other citizens."

One month after this Court rendered the decision in *Oklahoma Tax Commission v. United States*, the Tenth Circuit cited that case in its opinion in *United States v. Hester*, 137 F.2d 145 (10th Cir. 1943) and reached the same conclusion. The Tenth Circuit found at 147 that the sovereign State of Oklahoma has plenary power to tax all property within its domain, unless specifically restrained by force of federal law. Indians residing in Oklahoma are citizens of the State and they are amenable to its civil and criminal laws. Their property, unless exempt, is subject to taxation in the same manner as property belonging to other citizens of that State. The Tenth Circuit also held that a necessary incident of the power to tax property is the power to uniformly enforce the collection of the tax by any constitutional means deemed appropriate to that end.

The Supreme Court of the State of Oklahoma has more recently ruled on the extent of tribal sovereign immunity in the case of *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985). The State Supreme Court found that although some adherence to the immunity doctrine continues, the strict territorial approach applied earlier has largely given way to two other tests developed by the United States Supreme Court since 1959 for assessment of Indian Country's amenability to state law, namely infringement upon tribal self-government and pre-emption by federal action. After balancing the State's interests, the tribal stake in self-government and the federal policies and legislation, the State Supreme Court concluded that state residuary jurisdiction may be excersied to the extent that tribal activity in Indian Country takes on a form that necessarily affects non-Indians and Indians who are non-members of the self-governing tribal unit. The State Court ruled at 711 P.2d 91, 'Tribal sovereignty is not a bar to state jurisdiction, although states must meet the modern tests for measuring infringement upon tribal self-government and federal pre-emption."

A. *The reservation system and tribal sovereignty within that system has been disestablished in Oklahoma.*

The cases cited above demonstrate that the Indian Tribes in

Oklahoma have received much different treatment than reservation Tribes in other states. To understand why Oklahoma is singled out in these cases for special treatment in this area of the law involves an understanding of the unique history of the formation of this State and the resultant factual distinction of being an "assimilated" state as opposed to a "reservation" state. To begin the analysis, history instructs that during the early part of the nineteenth century, the Five Civilized Tribes who inhabitited the Southeastern part of the United States, which included the Chickasaw Nation, were removed to reservations set aside for their use in Indian Territory which later became the present State of Oklahoma. Due to their alignment with the Confederacy during the American Civil War, the Chickasaws were required to cede the Western part of their domain to the United States so that their last reservation was located in what is now Southeastern Oklahoma. The map of *Indian Lands and Related Facilities* as of 1971, compiled by the Bureau of Indian Affairs in cooperation with the U.S. Geological Survey, U.S. Department of Interior, identifies the former Chickasaw reservation in Oklahoma, and also shows that at one time, almost the entire state was an Indian reservation. However, in the years just prior to Statehood at the turn of the century, these reservations were disestablished.

As outlined by the Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), in the latter half of the nineteenth century, large sections of the western States and Territories were set aside for Indian reservations. Towards the end of the century, however, Congress increasingly adhered to the view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land. This shift was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving West. As a result of these combined pressures, Congress passed a series of surplus land acts at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement. To this end Congress enacted the General Allotment Act of 1887, 24 Stat. 388 (25 U.S.C. §331) under which many of the reservations belonging to the smaller tribes in Indian territory were allotted. However, the Chickasaws were excluded from the

provisions of this Act as were the other Civilized Tribes.

The case of *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C. 1976) details some of the history of the Five Civilized Tribes in Indian Territory. At page 1121 the district court states that during the last quarter of the nineteenth century the number of white persons living in Indian Territory grew dramatically. Although white settlement was illegal, the federal government did nothing to stop it. One recurrent problem was the general absence of an adequate court system to deal with disputes. In this atmosphere, crime flurished and debts were unenforceable. Also, white settlers were not happy with their inability to exercise political control over the Territory to mold the environment to their liking. As the white population continually grew, so did the demand to abolish the reservations so that land could pass freely into white hands and the Territory could be politically reorganized into a state.

By 1890, when the Oklahoma Territory adjacent to the Indian Territory was opened and a territorial government created, the clamor for allotment had reached a new peak. All the federal agencies responsible for Indian Affairs were advising Congress of the need to change the current system.

The case of *Woodward v. DeGraffenried*, 238 U.S. 284 (1915) details the efforts of Congress to organize the Territories for Statehood. At 238 U.S. 295, this Court found that under the Act of March 3, 1893, known as the Dawes Commission Act, 27 Stat. 612, it was the declared policy of the Congress to seek the allotment of all reservations in Indian Territory. To this end Congress, at §16 of this same Act, created the Dawes Commission for the purpose of extinguishing the tribal titles, either by cession or allotment, with a view to the ulitmate creation of a state to embrace the lands within the territory. At page 296, n.1, the Court cites the annual reports of the Dawes Commission in its efforts to further the policy of Congress; efforts which the Court describes as beginning in discouragement, but finally crowned with success.

There were twelve reports filed by the Dawes Commission with Congress between the years 1894 and 1905. Although the Commission to the Five Civilized Tribes, as it was officially called,

was charged with negotiating the cession of land form the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, its broader mission was to restructure the government of Indian Territory with a view towards creation of a State for the Union. To this end the Commission concentrated its efforts on the Five Civilized Tribes because the smaller Tribes were effectively divested of their reservations under the Dawes Severalty Act of 1887, General Allotment Act, supra, which did not apply to the Five Tribes.

The reports of this Commission are improtant to this case because they give an accurate first-hand account of the conditions existing throughout the Indian Territory which greatly shaped the policies adopoted by Congress and form a basis to develop an understanding of Congressional intent with regard to disestablishment of all reservations in Oklahoma and the admission of Oklahoma as a State. These reports are so essential to the understanding of Congressional policy in pre-Statehood Oklahoma that they are reproduced in chronological order and are lodged with the Clerk for the convenience of the Court.

A preliminary report on the objective of the Dawes Commission filed by the Select Committee on the Five Civilized Tribes, relating the facts and conclusions of a fact finding mission to Indian Territory, was released in Senate Report No. 377, 53rd Congress, 2d Session, May 7, 1894. The Committee first quoted the report of the Committee on Indian Affairs submitted to the Senate July 26, 1892, which stated that when the treaties were made with the Five Civilized Tribes after the Civil War, it was the policy of the government to make an exclusive Indian Territory, to which should be removed other Indians, so that the whole Territory should become filled with Indian tribes alone. This policy included the idea of a Territorial Government in which all of the Tribes which might occupy Inidan Territory should have representation after the manner of other territorial governments. An article was inserted in each treaty made with the Five Tribes in 1866 by which they consented to become members of such territorial governments. The plan thus proposed was never carried into execution, in part because of reasons stated by the tribes in the Annual Report of Commission of Indian Affairs for 1865, pp. 306-351 that such a government could not work among them.

Due to the lack of a central territorial government the Select Committee described the plight of the inhabitants of Indian Territory. The Administration of law among the growing white population and the Indian citizens was materially hindered by the complex jurisdictional tangles and an insufficient law enforcement structure. There was no public education and the best land was monopolized for the personal profit of a few tribal leaders to the exclusion of the other tribal members.

These conditions led that Committee to conclude that that Indian Tribes had breached the trust that was plainly provided in the treaties to hold this vast estate in land for the equal benefit of all Indian citizens. "Whatever power Congress possessed over the Indians it still possesses; notwithstanding the several treaties may have stipulated that the Government would not exercise such power, and therefore Congress may deal with this question as if there had been no legislation save that which provided for the execution of the patent to the tribes." The Committee then stated at page 12 of the report:

> It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government can not continue. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change can not be much longer delayed. The situation grows worse and will continue to grow worse. There can be no modifications of the system. It can not be reformed. It must be abandoned and a better one substituted. That it will be difficult to do your committee freely admit, but because it is a difficult task is no reason why Congress should not at the earliest possible moment address itself to this question.

The Committee ended its report stating that they did not want to suggest what action Congress should take because they preferred to wait and see whether the Dawes Commision could negotiate a change in the present very unsatisfactory condition of that country. "But if the Indians decline to treat with that commision and decline to consider any change in the present condition of their titles and government the United States must, without their aid and without waiting for their approval, settle this question of the character and condition of their land tenures and establish a government over whites and Indians of that Territory in accordance with the principles of our constitution and laws."

The *first report of the Dawes Commission* was submitted on November 20, 1894, House Ex. Doc., Part 5, 53rd Cong., 3rd Sess., Vol. 14, pp. lix-lxx. The Commission reported the extreme opposition they met from the powerful tribal leaders who controlled the land monoply. The Commission provided an example by relating a meeting with the Creek Tribe where the Commission addressed the citizens upon the subject of their mission. After the Commissioners' address, the Chief of the tribe addressed the people in the Creek language which was not translated for the commissioners. Afterward the commissioners were informed that the Chief stated to the tribe that if they acceded to the propositions of the Government and accepted allotment they would each receive a lot of land only 4 by 8 feet, and thereupon called for a vote of the people on the Commission's proposals which were soundly rejected.

The Commission then reported what they found in the Territory. Railroads threaded every section of the country and large twons had been established for the large non-Indian population that continually grew in the Territory at the invitation of the Tribe for the profit of the tribal leaders. The solicitude and isolation of the Indian was no longer possible. The executory provisions in the treaties had become impossible to execute because of the neglect on both sides to enforce them. Without regard to any observance of the treaty stipulations on their part, the Indians claimed that these treaties were irrevocbly binding on the United States. Furthermore, lawlessnes was widespread and the tribal governments became powerless to protect the life or property rights of its citizens. "A reign of terror exists," wrote the Commissioners, "and barbarous outrages, almost imposible of belief, are enacted, and the perpetrators hardly find it necessary to shun daily intercourse with their victims".

Also the Commission reported that corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. The report concluded that justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. The United States granted to these tribes the power of self-government, not to conflict with the Constitution. They have demonstrated their incapacity to so govern

themselves, and no higher duty can rest upon the government that granted this authority then to revoke it when it has so lamentably failed.

In the *second report* submitted November 14, 1895, House Doc. No. 5, 54th Congress, 1st Sess. Vol. 14, pp. lxxix-xcvii, the *third report*, November 18, 1896, House Doc. No. 5, 54th Cong., 2d Sess., pp. cl-clv, and the *fourth report*, October 11, 1897, House Doc. No. 5, 55th Congress 2d Sess. Vol. 12, pp. cxvii-cxl, the commissioners reiterated the findings of the *first report* with emphasis and specifically detailed the issue of misruled in the Territory. Also, the commission noted a growing desire within the general community of the Territory for a change in the tenure of tribal property and government through allotment in severalty. However, since allotment would prove the downfall of the present system, the wealthy and powerful tribal leaders who controlled the land-holding monoply were still opposed to it for obvious reasons.

Since the Tribes were still resisting change and the efforts of the Dawes Commission had accomplished little, the Congress enacted the Curtis Act, June 23, 1898, 30 Stat. 495, which gave more power to the Dawes Commission and limited the power of the tribal governments in order to speed the process of negotiation. The Curtis Act also provided for the allotment of the Chickasaw reservation to tribal members at 30 Stat. 505, Section 29, known as the Atoka Agreement.

The *fifth report of the Dawes Commission* submitted October 3, 1898, House Doc. No. 5, 55th Congress, 3d Sess. Vol. 15, pp. 1051-1090, the *sixth report*, submitted September 1, 1899, House Doc. No. 5, 56th Cong., 1st Sess. Vol. 19 pp. 3-178, the *seventh report* submitted September 1, 1900, House Doc. No. 5, 56th Cong. 2d Sess. Vol. 28, pp. 5-79 and the *eighth report*, October 1, 1901, House Doc. No. 5, 57th Cong. 1st Sess., Vol. 24, pp. 5-221, discuss the effect of the Curtis Act on the Territory by the way the tribes were induced to enter into the agreements that would forever change their way of life and replace their tribal governments with a constitutional state government to rule all of the people in the territory by representation and provide the benefits of an ordered society that only a state can provide.

The prefatory to the eighth report contained the following statement:

> It could not have been contemplated by Congress that within the borders of the United States should be permitted to spring up independent republics, unanswerable to the General Government. Even had such a course been harmonious with our form of government, the inability of the tribes to restrain lawlessness and maintain stable governments, free from corruption, precluded the possibility of their continuance. While the aborigines were, by a long-established and high conception of right, independent of treaty considerations, entitled to the undistrubed possession of a domain of reasonable proportions, a higher law than that of the Congress destined them to extinction as a race and their absorption by a people whose government has now taken foremost rank among the nations of the world. While sympathy may well be felt for the American Indian, his passing is but one of the melancholy events which are so often followed by most fitting sequences.
>
> The ownership of land in common having proved, under modern conditions, a lamentable failure, and the Government having wearied of fruitless negotiations, Congress undertook, by the passage of the Curtis Act, approved June 28, 1898, to formally administer upon the estate of the Five Civilized Tribes, which, while vast in extent - almost as large as the State of Ohio - has not been deemed more than is needed under present conditions by the seventy-five or eighty thousand heirs in whom the title is vested. To allot them land upon any other principle than equality of value would remedy none of the evils arising from the unequal distribution of land which have so long existed; while to apply this principle, as the law provides, involved one of the largest, most intricate and difficult undertakings in which our Government has ever been engaged.

The statements made in the fifth through the eighth reports, which followed the enactment of the Curtis Act by Congress, indicate the belief of the Commission that the tribal government system would be disposed of and replaced by a constitutional state government that would be part of the federal system and would meet the needs of its people and fulfill the manifest destiny of the still energing nation for the benefit of all within its borders.

During the next year, the work of the Commission progressed rapidly and according to the *ninth report*, July 20, 1902, House Doc. No. 5, 57th Cong., 2d Sess. Vol. 18, pp. 180-217, the end of the project, started a decade before, was coming into view. In the *tenth report*, September 30, 1903, House Doc. No. 5, 58th Cong. 2d Sess., Vol. 20 pp. 1-109, the Commissioners reviewed the work of the Commission from its inception. The following excerpt contains the Commissioner's comments about the history of the Dawes Commission:

> The problem to be dealt with in this Territory developed upon Congress slowly. For the first five years - namely, from 1893, the year the Commission was created, until 1898 when the Curtis Act was passed - this body was clothed with only negotiating power, except a limited function under the act of June 10, 1896, relating to determination of citizenship rights.
>
> The object of Congress from the beginning has been the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard.
>
> It was evident at the end of the first five years that the accomplishment of the foregoing object by negotiation alone was practically impossible. The Indians (so called, for most of them by a century and a quarter of intermarriage have far more Saxon than Indian blood) would never surrender by consent what they did want to give up at all. The Commission, as then constituted was able to bring to the discussion neither inducements nor force. Some of the tribal members held passionately to their institutions from custom and patriotism, and others held with equal tenacity because of the advantages and privileges they enjoyed. It was almost worth a man's life at that time to advocate a change.
>
> Under these conditions Congress was in 1898 fairly confronted with the alternative of either abandoning its policy and abolishing the Commission, or else of converting the Commission from merely a negotiating body into also an executive and semijudicial body, and of proceeding with the work under the constitutional

> power of Congress, and largely, at least, regardless of the will of the tribes.
>
> A strenuous effort was made to prevent the adoption of the latter course. So pronounced was the opposition and so sever were the criticisms heaped upon the Commission that at one time there seemed to be no doubt of success for those who favored this policy. But in what may be deemed a fortunate hour it was decided not to act without giving a chance to the special representatives of the Government to be heard, both in their own defense and with respect to what course should be adopted. This led to such a revelation of slander, corruption, and oppresion that Congress immediately passed the Curtis Act, and it has been followed by prompt appropriations for its execution, amounting now to nearly $1,000,000.
>
> That act undertook, not to let anybody and everybody come forward and take public land, but to administer upon five great estates, aggregating 20,000,000 acres. It ordered these estates to be partitioned among the individual heirs upon the principle of equal value; and it could hardly have done less, and at our expense, under the stipulations of treaties.

In the *eleventh report*, October 15, 1904, House Doc. No. 5, 58th Cong., 3d Sess., Vol. 20, pp. 1-198, and the *twelfth and final report*, June 30, 1905, House Doc. No. 5, 59th Cong., 1st Sess., Vol. 19, pp. 579-640, the Commissioners outlined the culmination of their work of preparing the rolls of citizens and allotment of all the land to make way for the creation of the State of Oklahoma. The Objectives of the Commission, the allotment of the land and the effacement of the tribal governments, were successfully obtained and the great effort of the Commission, spanning more than a decade, enabled the national government to create a State to be admitted to the Union for the benefit and protection of the Nation itself, as well as the citizens who resided there.

As was their stated intent, the Commission had accomplished the reconstruction of the Territory in order to replace the several tribal governments with a constitutional State government capable of admision into the Union on an equal footing with the original States. This culminated in the report filed by the Committee on the

Territories recommending Oklahoma statehood in the House of Representatives' Report No. 496, January 23, 1906, 59th Congress, 1st Sess. to accompany H.R. 12707, the Oklahoma Enabling Act, 34 Stat. 167.

In this report the Committee reveiwed the history of Indian Territory and the work of the Dawes Commission which enabled the Oklahoma and Indian Territories to be admitted as a single State. The Committee stated that it was the intendment of Congress by the Oklahoma Organic Act of May 2, 1890, 26 Stat. 81, that Oklahoma Territory should increase in geographical scope from time to time as the various reservations in Indian Territory were disestablished and attached to Oklahoma. The Committee stated at page 8 of the report:

> Construing the organic act of Oklahoma according to its obvious fritent, that all the lands within the original limits of the Indian Territory should eventually be merged into the Territory of Oklahoma and thereafter into a State, the question to be determined is whether the so-called Indian Territory is ready to be joined with Oklahoma in a State, whether it may be so joined equitably so far as the Indians of Indian Territory are concerned.
>
> The Indian territory is not an organized Territory, but is an area of land occupied by the Five Civilized Tribes, viz, the Creeks, Choctaws, Chickasaws, Cherokees and Semi-noles, and certain small tribes in the northeast corner of the Indian Territory who hold their lands by patent.

The question of whether Indian Territory was ready to be joined with Oklahoma in a State was answered by the Committee affirmatively. In order to be ready for statehood the Indian Territory had to meet two basic conditions, namely, disestablishment of the reservations by allotment, and abolishment of the tribal government system so that individual private land ownership would replace the communal title and the new State government would replace the former tribal governments. As to these conditions, the Committee found that the time for State government had arrived. See page 10 of the report.

The Conclusion of the Committee report is as follows:

> Inasmuch, then, as in the opinion of this committee, the Congress intended by the organic act of the Territory of Oklahoma, that all of the original Indian Territory, together with what is now Beaver County, should become one State; and
>
> Inasmuch as the present Territory of Oklahoma has for some time been qualified for statehood, which has been deferred until the Indian Territory should be ready to be joined therewith in statehood; and
>
> Inasmuch as conditions in the Indian Territory imperatively demand some better form of government than now exists there; and
>
> Inasmuch as Indian lands will be allotted in severalty before the time when statehood can go into effect as provided for in this bill, and for all the reasons set forth in this report, this Committee report in favor of the joinder of the Territory of Oklahoma and the Indian Territory in one State, such State to be known as the State of Oklahoma.

The foregoing reports form the authoritative Congressional history of the creation of the State of Oklahoma from the first-hand accounts of Congressmen and government officials who were there. It is from this beginning that the State Government assumed the jurisdiction over all citizens of the State with the concurrent plenary power to tax all property unless specifically restrained by federal law.

From the tenor of these legislative reports and the actions of Congress at the turn of the century, it is clear that the federal government was unpleased with the course of social evolution in the Indian Territory and Congress worked in earnest to effect a lasting change in the way these citizens would be governed. This was not a mere surplus land act but a comprehensive program by the Federal Government to politically reconstruct the Territory. The assimilation policy of Congress at this time was so strong that the enactments of Congress were in complete derogation of the treaties made with the several tribes. Congress had concluded that since the tribal governments had violated their duties under the treaties and the federal government made no effort to enforce the agreements on its part, the treaties had to be set aside in order to restore a constitutional government in the Territory. Of course, the more influential tribal leaders who profited from the reservation system mounted

opposition to the disestablishment of that system and pointed out that the treaties distinctly provide that the Indian lands would never be included within a state or territory. The fact that these reservations were eventually included within the State of Oklahoma, in spite of the treaties, only underscores more boldly the intent of Congress to dispose of all reservations in Oklahoma.

Of course the Indian tribes questioned Congress' ability to revoke treaty stipulations without their consent. However, this court put that question to rest in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), where the Court ruled at 23 S.Ct. 221:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

The Court held in that case that Congress had the power to abrogate the provisions of an Indian treaty unilaterally. But even before *Lone Wolf*, the Supreme Court had determined that the treaties with the tribes in Oklahoma must yeild to congressional enactments. In the *Cherokee Tobacco*, 11 Wall. 616, 20 L.Ed. 227 (1871) the Court ruled at page 229:

> A treaty may supersede a prior act of Congress *(Foster v. Neilson*, 2 Pet. 314), and an act of Congress may supersede a prior treaty. *Taylor v. Morton*, 2 Curt. 454; *The Clinton Bridge*, 1 Woolw. 155. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

The preceding argument paints a vivid picture of congressional intent to disestablish all reservations in Oklahoma. This intent and belief has carried forward to the present, and Congress has since recognized that no reservations survived past Statehood. The Senate report on the Oklahoma Indian Welfare Act, 25 U.S.C. §501 et. seq. S.Rep. No. 1232, 74th Congress 1st Sess., July 29, 1935, states:

> In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citzenship of the State.
>
> Under the Oklahoma constitution and our laws, all Indians are full citizens and enjoy all the right extended to white citizens. The Wheeler-Howard bill was evidently prepared having in view the large Indian reservations located in the western and southwestern States. The Oklahoma Indians having made progress beyond the reservation plan, it was thought best not to encourage a return to reservation life.
>
> Inasmuch as the Indians of Oklahoma present many and varied problems, special consideration has been given to such State and as the result of such study, Senate bill 2047 was prepared and is now pending before the Congress for consideration.[1]

The view held by Congress that no reservations remain in Oklahoma is also shared by the executive branch. The U.S. Department of Commerce published a handbook outlining various aspects of many of the Indian tribes in the United States entitled *Federal and State Indian Reservations and Indian Trust Areas (1973)*, cited in the pet. for cert. in footnote 2, page 12.

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[1] The Wheeler-Howard bill was enacted as the Indian Reorganization Act, 25 U.S.C. §461 et seq. The tribes in Oklahoma were excluded from the application of this Act at 25 U.S.C. §473.

The D.O.C. commented in the description of the Chickasaw Tribe that "This tribe has commingled both culturally and economically with the non-Inidan society to a greater degree than many other Oklahoma tribes." The comments on the Oklahoma tribes in this book express the assimilation and lack of autonomy of these tribes.

All of these opinions expressed in Supreme Court decisions, congressional reports, and federal publications, coupled with the surrounding circumstances which prompted Congress to adopt the policy of allotment and assimilation of the several reservations in Indian Territory all point to the conclusion that the tract of land in question here, or any tract of land in Oklahoma, is not a reservation.

This Court has held in *Solem v. Bartlett*, supra, that explicit language of cession and unconditional compensation are not prerequisites for a finding that a reservation has been disestablished. The Court also looks to surrounding circumstances, the tenor of legislative reports presented to Congress, and events that happended after the passage of the Act as well as Congress' own treatment of the affected area in the following years to decipher Congress' intentions. Where non-Indians settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, the Court acknowledges *de facto*, if no *de jure*, diminishment, *Solem* at 465 U.S. 471, citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). When the factors set out in these three cases are applied in the context of the case at bar, it is clear that reservations no longer exist in Oklahoma.

To return to the present case, the proposition that there are no reservations in Oklahoma brings this case squarely within the fact pattern of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In that case Mescalero Apache Tribe acquired a tract of land from the United States Forest Service upon which they developed and operated a ski resort. This land was contiguous to the Tribe's reservation in New Mexico. In note 11 of the *Mescalero* opinion, this Court explained that the arrangement by which the Tribe acquired the land from the United States brings the Tribe's interest in the land within the tax immunity afforded by 25 U.S.C. §465 in the Indian Reorganization Act. The tax immunity in §465 exempted the land

from ad valorem taxes and the Supreme Court held that this immunity from tax extends to the compensating use tax assessed against the permanent improvements installed on the land to constuct the ski resort.

The facts in *Mescalero* are comparable to the facts in the case at bar. The Chickasaws acquired the land from the United States, which land was transferred in trust for the tribe under 25 U.S.C. §501 and §465. Therefore, in both cases the Tribe acquired non-Indian land from the Federal Government which was transferred in trust for the Tribe. In both cases, the Tribes developed a business enterprise on their land, open to the general public, in competition with similar private businesses in the same community. Although the land acquired under §465 or §501 is not subject to ad valorem taxes, the tax immunity under these statutes does not extend to income or sales generated from the use of the land.

When confronted with these facts in the *Mescalero* case, the Supreme Court began its discussion of the opinion by rejecting the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land. The Court determines the various rights of the State, Tribe, and Nation by entering an individualized examination of particular treaties and federal statutes as they affect the various institutions. The upshot has been the repeated statements by the Supreme Court that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. However, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, the State has no authority to tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation under the ruling in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). The Supreme Court stated at 411 U.S. 148:

> But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake v. Egan*, 369 U.S. 60, (1962). Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

The *Mescalero* case clearly demonstrates that land acquired in trust for the Tribe under §465, outside of an Indian reservation, does not create Indian country status. Indian country cannot be created by the operation of the statute which merely authorizes the acquisition of land in trust, rather, the status must be conferred by Congress and specifically proclaimed; an action which Congress did not take in the Mescalero case nor in the case at bar.

After dismissing the Mescalero's claims of tax exemption under the intergovernmental immunity doctrine, the Court turned its analysis to the scope of the immunity afforded by §465. Section 465 states that "such lands or rights shall be exempt from State and local taxation," while Section 501 provides "said lands shall be free from any and all taxes" (Except State gross production tax). The language of the two statutes are similar and have a like effect. The Supreme Court found that on its face, §465 exempts land from taxation but not income derived from its use. The interpretation of §501 can only be synonymous with the interpretation of §465. Absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.

The Appeals Court below has effectively foreclosed the application of *Mescalero* by its cryptic ruling that an Indian Tribe enjoys sovereign immunity from suit within its territory. Thus, the Tenth Circuit has created in the Tribe a sovereign super-entity which can sue and not be sued, make law and be subject to no law, and exercise unknown rights while at the same time ignore the existing rights of others. The ramification of this position is far reaching in that the Tribe will be free of any state law and unanswerable for any damage it causes to employees, other businesses with which it deals,

and the general public that comes in contact with it. But the State would submit that the Tribe is answerable to state law, even within Indian Country in Oklahoma, because of the inherent difference between an assimilated state such as Oklahoma and the traditional reservation states.

B. *State law is applicable within Indian Country in Oklahoma.*

The difference between Oklahoma and the reservation states is that in these other states the reservation boundaries clearly delineate between state and federal or tribal jurisdiction in a specific and contiguous land area. In Oklahoma, no reservation boundaries exist and the only type of Indian Country remaining is Indian allotments which are scattered randomly throughout most of Oklahoma within the former reservation areas and Indian trust lands under §465. These allotments vary in size from just a few acres to the standard 160 acre allotment.

The isolation of small tracts of Indian Country in Oklahoma was not the situation which presented itself in the reservation cases. In *Seymour v. Superintendent*, 368 U.S. 351, (1962), the Court faced the question of whether the State of Washington had jurisdiction to prosecute an Indian for n offense committed on a tract of land in the Colville Reservation which was owned in fee by a non-Indian. The Court held that the entire block of land within the reservation borders was Indian Country under 18 U.S.C. §1151 regardless of how the land was held. The Court ruled at 368 U.S. 358:

> Where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of §1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Court faced a similar question concerning whether state law applied to Allotments within the Flathead Reservation in Montana. The Court cited the *Seymour* case for its holding at 425 U.S. 478 that "Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area."

The effect of the decisions in *Seymour* and *Moe* was to consolidate the jurisdiction within the contiguous area of an Indian reservation in the federal government, regardless of how the title to land was held, in order to ease the administration of law. This made sense under the federal statutes in Title 18, U.S.C. because it would be impractical for law enforcement authorities to scrutinize tract record books in the county clerk's office before they answered a call or investigated a crime. Also the trial of simple offenses could be protracted by the necessity of proving up land titles.

However, in *Decoteau v. District Court*, supra, the Court acknowledges in note 3 at 420 U.S. 429 that this sensible approach to §1151 on the reservation might be awkward in other contexts. The Court stated, "We note, however, that §1151(c) contemplates that isolated tracts of "Indian Country" may be scattered checkerboard fashion over a territory otherwise under state jurisdiction. In such a situation, there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory. How these conflicts should be resolved is not before us." Also, the Supreme Court again noticed this problem in *Solem v. Bartlett*, supra, in note 12 where it was said, "When an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian Country seriously burdens the administration of State and local governments." These cases dealt with reservations and did not present the problem of isolated Indian allotments, but this language does indicate that a different result may be warranted in such a case. As discussed above, the Supreme Court has treated Oklahoma differently in *Oklahoma Tax Commission v. United States*, where the State's tax collection efforts were enforced because of the lack of tribal autonomy in Oklahoma.

Insofar as §1151 operates directly to displace the State's ability to administer its tax laws evenly upon all citizens, it is not within the authority granted Congress by the Commerce Clause. Indian Allotments or Indian trust land in Oklahoma are not federal land areas such as Indian reservations. A reservation, as we have seen, can be disestablished, divided up, and sold off by the federal government. An Indian allotment, or trust land, like any privately owned piece of land, cannot be taken from its owner without due process. So this case does not deal with federally owned land but privately owned land. In attempting to exercise its Commerce Clause power to pre-empt the application of state tax laws upon business activities within the State on privately held land, Congress has sought to wield its power in a fashion that would impair the State's ability to function effectively in a federal system.

Under the Supreme Court's ruling in *National League of Cities v. Usery*, 426 U.S. 833 (9176), Congress may not regulate commerce so as to force directly upon the States its choices as to how essential decisions reagrding the conduct of integral governmental fucntions are to be made, especially in cases such as this which do not involve interstate commerce or federal land areas.

The State notes that *Usery* was overruled by this Court in *Garcia v. San Antjonio Metro.*, 469 U.S. 528 (1985) which ruled contra to *Usery* that the federal Fair Labor Standards Act does apply to State and local employees. However, the State does not cite *Usery* for the holding in that case concerning the State's immunity from the FLSA. Rather, the State cites *Usery* for the proposition that, under the principles of federalism embodied in the Constitution and the States' rights for separate and idependent existence protected by the Tenth Amendment, there are limits on the Federal Government's power under the Commerce Clause to interfere with or impair the State's integrity or its ability to function in a federal system; a proposition which was recognized in the *Garcia* opinion for its continued validity.

Obviously, the 1948 amendments to the Major Crimes Act in the United States Code which codified Indian Country for purposes of federal criminal jurisdiction did not have in mind the situation of the allotments in Oklahoma in the context of civil taxing jurisdiction within the State. While §1151 is concerned, on its face, only with

criminal jurisdiction, the Supreme Court has recognized that it generally applies as well to questions of civil jurisdiction. As applied to reservation states, §1151 works to eliminate the vexing problems of "checkerboard jurisdiction" which is desirable for many cogent reasons. however, this reasoning falls apart when applied to Oklahoma where §1151 creates the checkerboard jurisidiction that it was intended to resolve. The Supreme Court has recognized that the application of §1151(c) to such a situation would "seriously burden the administration of State and local governments," see *Solem*, n. 12.

To the extent that §1151 seriously burdens the adminsitration of State government in Oklahoma, it is an unconstitutional exercise of Congressional power. Before the enactment of §1151 in 1948, the Supreme Court ruled in *Oklahoma Tax Commission v. United States*, supra (1943), that the federal statutes granting limited property restrictions and exemption from ad valorem taxes does not imply an expansive immunity from all general non-discriminatory state taxes. "Wardship with limited power over his property did not there without more, render the Indian immune form the common burden."

Unquestionably, before the enactment of §1151, Oklahoma had the plenary power to tax all property within its domain unless *specifically* restrained by federal law. This was the intent and effect of the Statehood legislation and the work of the Dawes Commission which dethroned the tribal governments within the reservation system and replaced them with a constitutional state government. Since that time, as far as the operation of §1151 intrudes on the necessary functioning of intrastate affairs, it has unconstitutionally impaired the sovereignty of this State by curtailing the State's recognized power to tax its citizens. Although Congress has granted specific tax immunity to Indian allotments from state ad valorem taxes, the general implication of immunity provided by §1151 by extending the statute beyond its face to civil jurisdiction, is an unconstitutional construction as applied to Oklahoma. Likewise, the enactment of PL 83-280, 28 U.S.C. §1360, in 1953 did nothing to hinder the existing jurisdiction of this State as the Tribe would suggest. This Court has ruled in *California v. Cabazon Band of Mission Inidans*, 107 S. Ct. 1083 (1987) at 1088, that Congress' primary concern in enacting P.L. 280 was combating lawlessness on

reservations. This specific problem was solved in Oklahoma by the Dawes Commission when all reservations were disestablished prior to Statehood. But even still, P.L. 280 is not a bar to State taxation and is not a license for the Tribe to make untaxed goods and services available to the general public in violation of State law. It could not have been the intendment of P.L. 280 that it should be used to aid the State's citizenry in such wholesale evasion of tax law.

It does not matter whether the allotment or trust land is owned by a tribe or an individual Indian because the State has plenary power to tax all property. The prospect that a state may tax or regulate a tribe is not new, see *Mescalero Apache Tribe v. Jones*, supra, *Organized Village of Kake v. Egan*, supra. It must be remembered that there is a fundamental difference between a state and a tribe. The state is an indestructible component of the government of this country. The Tribe has no part in the government of this country and is subject to complete defeasance.

The Constitution vests the Federal Governmen with exclusive authority over relations with Indian tribes, Art. I §8 cl.3, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, (1985). In *National League of Cities v. Usery*, the Supreme Court stated that "It is beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress." That authority is, in the words of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1894), "The power to regulate; that is to prescribe the rule by which commerce is to be governed."

However, the Court in *Usery* found that there is room for state's rights to co-exist within federalism. At 426 U.S. 842, the Court ruled:

> This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. In [*Maryland v. Wirts*, 392 U.S. 183 (1968)], for example, the Court took care to assure the appellants that it had ample power to prevent . . . the utter destruction of the State as a sovereign political entity, which they feared.

The Court recognized that an express declaration of this limitation is found in the Tenth Amendment: While the Tenth Amendment has been characterized as a "truism," stating merely that all is retained which has not been surrendered, it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the State's integrity or its ability to function effectively in a federal system.

In contrast to the limitations placed on Congress in respect of a state's sovereignty, the sovereignty of a tribe exists only at the sufferance of Congress and subject to complete defeasance, *Rice v. Rehner*, 473 U.S. 713 (1983). No immunity from legislative invasion can be claimed for Indian tribes and the consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance, *The Cherokee Tobacco*, 11 Wall. 616, 20 L.Ed. 227 (1871). Rather than Tenth Amendment protections, Indian tribes are merely protected by federal policy derived from the Constitution which has vascilalted from autonomy to assimilation and from termination to self-determination. But whatever the federal policy has in store for Indian tribes now and in the future, this policy is purely a function of the Federal Government, and the power to implement any federal policy is limited to the extent that policy might operate to excessively infringe on the states' rights in violation of the Tenth Amendment.

In many articles of the Constitution, the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized, *Usery*, citing *Lane County v. Oregon*, 7 Wall. 71, 19 L.Ed. 101 (1869). In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, (1926) the Court likewise observed that "neither government may destory the other not curtail in any substantial manner the exercise of its powers." The Court in *Usery* added that "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits its from exercising the authority in that manner."

In this case, the State's ability to levy taxes on its citizens for the support of the government can be nothing but a function essential to separate and independent existence. This State's plenary power to lay and collect taxes was recognized by this Court in 1943. Under the holding in *Usery* and *Garcia*, such plenary authority may not be abrogated by Congress. Inasmuch as the 1948 amendment to the Major Crimes Act trammells the existing power of Oklahoma to lay and collect taxes, the amendment is unconstitutional as it is so applied. Moreover, why should the State carry the burden of the federal policy in this regard. There is no reason why the government of the State should be prevented from taxing its own citizens upon transactions occurring on non-public lands, within the State, and outside the boundaries of any reservation or federal land area, by way of federal law.

Taxes are indispensable to the support of State Government because the State does not operate convenience stores, smokeshops or bingo halls to raise revenue. The State pays for government through taxation of its citizens. The Constitution not only provides, but requires, the states to maintain and support their own government. When the Federal Government attempts to restructure state taxation schemes, as is the result obtained by the lower court in liberating the Tribe from State law, that Government has exceeded its enumerated powers.

At one time intergovernmental tax immunity was once much in vogue in a variety of contexts stemming from Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 4 Wheat. 316 (1819). This position changed in more recent years as evidenced by Justice Holme's famous dissent in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 at 223 (1928), which was later vindicated by the opinion in *Alabama v. King Boozer*, 314 U.S. 1 (1941). Justice Holmes remarked:

> It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the

> States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destory while this Court sits.
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> * * * * *
>
> To come down more closely to the question before us, when the government comes into a State to purchase I do no perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal.

One reason that the intergovernmental immunity doctrine failed is that taxes are indispensable to the maintenance of a government and within our federal system, the tax base of the various governments could be undermined by the doctrine. Also, the doctrine was used by persons who were properly taxable to evade those taxes. Curiously, the Federal Government was experiencing the same difficulties that Oklahoma is facing today in collecting a tobacco tax over one hundred years ago. In *The Cherokee Tobacco*, 11 Wall. 616 (1871), the United States was attempting to enforce is tobacco tax laws against members of the Cherokee Tribe in Indian Territory. This Court held that the Indians were liable for the tax holding:

> The 107th section of the act of 1868 extends the revenue laws only as to liquors and tobacco over the country in question. Nowhere would frauds to an enormous extent as to these articles be more likely to be perpetrated if this provision were withdrawn. Crowds, it is believed, would be lured thither by the prospect of illicit gain.
>
> This consideration, doubtless and great weight with those by whom the law was framed. The language of the section is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed.

Under the Appeals Court's ruling in this case, Oklahoma is similarly faced with the prospect of seeing millions of dollars worth of goods being sold to the general public on 'Indian land" without the power to enforce tax collection.

Besides tax evasion, another practical problem facing the State rests in the inherent psychology of taxation in that, when an exemption from tax is granted, the tax payers then try to bring themselves within the exemption by disguise in form or a substantive change in their business. For example, if the government of a country decides to impose a tax upon all horses except white horses, the country will be instantly filled with nothing but white horses. By analogy, in Oklahoma, the State is witnessing businesses who tie themselves to the government of the tribe and produce substantial amounts of untaxed sales in this State under the erstwhile Indian exemption. The Federal Government was faced with a similar problem in *New York v. United States*, 326 U.S. 572 (1946), in which New York purchased the Saratoga Springs in order to conserve the natural resources of the springs. The State bottled the spring water, commercially marketed it and claimed inter-governmental immunity from the federal soft drink tax. Seeing that this immunity was undermining the tax base of the soft drink tax laws, the Federal Government challenged the immunity which was struck down by this Court.

The Court held that Congress may not lay taxes, for instance, upon a Statehouse or a State's tax revenues because these could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taxes a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. Congress may exempt states while taxing private enterprises, however:

> If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy."

Likewise, the Chickasaw Nation may carry out its own notion of social policy or self-government in engaging in the motel business, but it must pay its share in having a nation, a state and a federal system which enables the Tribe to pursue its policy. State taxation of the tribal business does not infringe on the self-government of the Tribe. New York apparently overcame its loss of immunity from the soft drink tax without ill effect.

Although the Tribe can point to treaty provisions which describe greater immunities than the Tribe enjoys today, those laws did not remain static throughout the course of history. The statesmanship practiced by the Dawes Commission dismantled those immunities in order to put the last piece of the continental United States in place. Whether or not these decisions were unfair does not negate the fact that laws respecting the tribes in Oklahoma were changed. That laws will change is an essential nature of government. "The science of government is the most abstruse of all sciences, if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment," *New York v. United States*, citing *Anderson v. Dunn*, 6 Wheat 204, 226.

The Federal Government created the State of Oklahoma and did not exempt the Tribes living there from the laws of this State. The immunities of this Tribe have been swept away and if the Tribe maintains any attribute of sovereignty, it is sovereign only unto itself. There remains but one sovereign nation within Oklahoma, that being the United States of America. It is, for these reasons, error, to dismiss the action of the State aginst the Tribe.

CONCLUSION

The Oklahoma Tax Commission respectfully requests that this Court reverse the opinion of The Tenth Circuit Court of Appeals which affirmed removal jurisdiction in federal Court on the basis of the affirmative defense of Tribal sovereign immunity cast as an inherent federal question in the original pleading. Based on this Court's ruling in *Catepillar v. Williams*, supra, that a federal defense does not provide a basis for federal question jurisdiction, the case should properly be remanded to the District Court of Murray County, State of Oklahoma.

The State further requests that the ruling of the Appeals Court dismissing the State's claim should also be reversed based on this Court's opinion in *Oklahoma Tax Commission v. United States*, and *Mescalero Apache Tribe v. Jones*, supra, that Oklahoma has plenary power to tax all property within the State save being specfically restrained by federal law and Indians going beyond reservation boundaries are subject to all nondiscriminatory state laws applicable to all other citizens. Also, principles of federalism embodied in the Tenth Amendment to the Constitution protect the State from invasions of federal law which would impair the State's integrity or its ability to function in a federal system. Therefore, the suit immunity of the Tribe based on Federal law should be struck down.

Respectfully submitted,

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No. 88-266

In The

Supreme Court of the United States

October Term, 1988

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

JAN GRAHAM, et al.,

Respondents.

BRIEF OF RESPONDENTS, JAN GRAHAM AND THE CHICKASAW NATION

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PRELIMINARY MATTER
QUESTIONS PRESENTED

(1) Does a complaint filed in a state court alleging the right to enforce state tax laws against a federally recognized Indian tribe and asserting subject matter jurisdiction raise a federal question?

(2) Does a court have subject matter jurisdiction in an action against a federally recognized Indian tribe absent an unequivocally expressed waiver of immunity by the tribe and Congress?

(3) Where the state court from which an action is removed to the federal district court does not have subject matter or in personam jurisdiction is the federal court correct in dismissing rather than remanding to the state court?

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BRIEF OF RESPONDENTS, JAN GRAHAM AND THE CHICKASAW NATION

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondents, Jan Graham and the Chickasaw Nation, Defendants-Appellees in the courts below, respectfully pray that the decision of the United States Court of Appeals for the Tenth Circuit be affirmed.

RESTATEMENT OF THE CASE

1. Nature of the Controversy.

The Chickasaw Nation of Oklahoma is one of the federally recognized Five Civilized Tribes. It was removed to south central Oklahoma in the early nineteenth century. Sulphur, Oklahoma, is located within the tribe's original reservation after removal. The same territorial boundaries are provided for in its present constitution adopted with the approval of the Secretary of the

Interior in 1983. (JA 20), see preamble. The Chickasaw Nation purchased the Chickasaw Motor Inn at Sulphur, Oklahoma, from the Economic Development Administration in 1972 with tribal trust funds as an economic development project. (JA 14). Respondent, Jan Graham, who was the tribe's manager of the enterprise is no longer an employee. The issues concerning Graham are therefore moot and since Petitioner has not addressed any issues relating to her in its brief neither do the Respondents.

The Motor Inn property is among a number of scattered tracts of trust land owned by the Chickasaw Nation totaling hundreds of acres, some of which were reserved from the allotment process and some purchased. All are within the boundaries of its original reservation. The Motor Inn site was subsequently conveyed to the United States in trust for the Chickasaw Nation. (JA 16). Petitioner does not dispute that the enterprise is situated on "Indian Country" (Pet. Brief, p.29) but for this Court's information, the United States District Court for the Eastern District of Oklahoma in another case involving an attempt to regulate bingo gaming at the Motor Inn, has determined it to be situated on "Indian Country" as defined by 18 U.S.C. §1151(a) and decisions of this Court.[1] Bingo gaming is regulated by an Act of the Chickasaw Legislature. (JA 21).

2. The Proceedings Below.

Respondents accept the first two paragraphs of Petitioner's "2. The Proceedings Below" and add the following in lieu of the remainder of Petitioner's statement.

Finding federal question jurisdiction, the district court denied the motion to remand saying: "It is apparent

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[1] *Chickasaw Nation et al. v. The State of Oklahoma, ex rel. Fred Collins,* District Attorney for Murray County, Oklahoma, et al., case number 86-32-C. A copy of the court's unpublished and unappealed from decision and is found as Appendix B to Respondents Brief in Opposition to the Petition for Certiorari.

from reading the petition that the State of Oklahoma is attempting to enforce its revenue statutes against a federally recognized Indian tribe, the Chickasaw Nation". (JA 10 and A-25, 26, Pet. for Cert.). The Court then sustained the Respondents' motion to dismiss on the basis that Respondents' sovereign immunity from unconsented suit deprived the court of subject-matter jurisdiction. (JA 11 and A-27, Pet. for Cert.).

The Tenth Circuit Court of Appeals affirmed. It rejected Petitioner's "well-pleaded" complaint argument stating that it had couched its "necessarily federal cause of action solely in state law terms" and that the substance of the claim was an attempt by the State "to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe". (JA 17 and A-12, Pet. for Cert.).

This Court granted certiorari, vacated the judgment of the circuit court, and remanded for further consideration in light of *Caterpillar, Inc. v. Williams,* 107 S.Ct. 2425 (1987). On remand the circuit court reaffirmed, finding *Caterpillar* inopposite because in this case federal question jurisdiction was "inherent within the complaint" and that the Petitioner had "attempted to "well-plead" its complaint . . . and thereby avoid the Chickasaw Nation's sovereign status". (A-3, Pet. for Cert.)

SUMMARY OF ARGUMENT

The threshold issue presented here is whether a complaint seeking to enforce state tax laws against an Indian tribal government in a state court presents a federal question. Examination of the complaint in this case shows on its face that it asserts the right to limit at least two aspects of federally conferred tribal sovereignty, i.e. the right to be free of application of state tax laws to tribal activities on trust lands and jurisdiction of the state's courts. Petitioner argues that these issues should not be considered for purposes of federal question determination as if the rights asserted are either a foregone conclusion or can have their presence in this case only as a defense. Either argument is without merit. There are no

federal statutes making Oklahoma's tax laws and the jurisdiction of it's court applicable to the Chickasaw Nation. Suits to limit aspects of Indian tribal sovereignty present federal questions based on federal common law. The underlying right, if it exists, for Petitioner to pursue its claim in a state court originates and is governed entirely by federal law. In other words, whether the State may apply its laws and whether its courts have subject matter jurisdiction are in themselves questions which arise under federal law. Moreover, because of the trust responsibility of the federal government and the exclusive plenary authority of Congress over Indian tribes, the complaint presents the not insubstantial federal issue of whether the rights asserted involve a non-justiciable political question. This complaint facially presents federal question jurisdiction because of the true nature of the suit, i.e. the parties involved and the necessarily federal issues presented and the rights at stake.

The well-pleaded complaint rule is not applicable to this case because a state law cause of action against an Indian tribe is unavailable here. Any cause of action by a state government against an Indian tribal government is federal no matter how it is pleaded. The Petitioner has attempted to engage in artful pleading by omitting essential elements of its necessarily federal cause of action, i.e. the federal source of the right to enforce its tax laws and subject matter jurisdiction in the state courts. This effort is an obvious attempt to close off Respondents' access to a federal forum. This is not a case of the plaintiff being master of its claim. Rather, it is a suit where the Petitioner seeks to circumvent and frustrate the intent and plenary authority of Congress.

Application of state tax laws on Indian tribal governments and tribal immunity from unconsented suit is completely preempted, by federal common law, treaties, and statutes. Public Law 280, 25 U.S.C. §1360 and 25 U.S.C. §1322; Indian Self-Determination and Education Act, 25 U.S.C. §450, 450(N); Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §501, Indian Gaming Regulatory Act of 1988, Senate Bill 555, Congressional Record, September

15, 1988, S 12657 et seq.; *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1984); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1919); *Turner v. United States*, 248 U.S. 354 (1919). The preemptive force of these authorities, together with various treaties, the plenary power of Congress, the federal interest as the trustee for the tribes, and numerous other federal judicial decisions forming federal common law is so powerful as to completely displace any state cause of action if one even exists.

The state court from which this case was removed was without subject matter or in personam jurisdiction. Absent the necessary derivative jurisdiction for removal purposes remand was improper and the lower court correctly dismissed. *Minnesota v. United States*, 305 U.S. 382, 389 (1939).

Sovereign immunity from suit for Indian tribes in Oklahoma and subject matter jurisdiction of the state court is dependent not on whether the cause arises on a reservation or Indian country but the will of the United States Congress. Even if geographical considerations were the criteria, Congress never expressly disestablished the Chickasaw reservation by enacting the Curtis Act. 20 Stat. 495 and, in any event, this Act was repealed entirely by the OIWA, supra.

The Tenth Amendment argument advanced by Petitioner fails because of the unique relationship of the federal government and Indian tribes and the plenary power of congress reserved in the Indian Commerce Clause, Article 1, Section 8, Clause 3, of the United States Constitution. This is further evidenced by the proviso in Oklahoma's Enabling act wherein Congress retained jurisdiction over Indians and their affairs. The right to apply tax laws and to have subject matter jurisdiction over Indian tribes and their affairs must be expressly conferred by Congress. Moreover, these may be issues involving political questions which this Court should defer to the proper department.

This case was properly dismissed for lack of subject matter and in personam jurisdiction.

ARGUMENT

I. THE LOWER COURTS CORRECTLY RULED THAT THIS CASE WAS PROPERLY REMOVED FROM THE STATE COURT BECAUSE THE PETITIONER'S CLAIM NOT ONLY ARISES OUT OF BUT IS COMPLETELY PRE-EMPTED BY FEDERAL LAW

After removal, the federal district courts exercise threshold jurisdiction to determine jurisdiction. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Minnesota*, supra at 389. If the subject matter is exclusively within the state court's jurisdiction the court will order remand. An exception is where the state court lacks either subject-matter or in personam jurisdiction the federal court must dismiss rather than remand. It has been said that "jurisdiction of the federal court on removal is, in a limited sense, a "derivative jurisdiction," *Minnesota*, at 389; *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 383 (1922); *General Investment Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 288 (1922) and the court is required to dismiss rather than remand even though the federal district court might have had original jurisdiction had the case been initially filed with it.[2] It is in the latter category that the Circuit Court cast the present case.

Respondents now turn to Petitioner's contention that federal question jurisdiction for removal was absent.

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[2] This rule was abolished on June 19, 1986, after this cause was removed by amendment to 28 U.S.C. §1441. Subparagraph (e) now provides:

> "The court to which such action is removed is not precluded from hearing and determining any claim in such civil action because the state court from which such civil action is removed did not have jurisdiction over the claim."

A. Federal Question Jurisdiction Arising Out Of Federal Common Law, Federal Statutes, Treaties, And The Constitution Appears On The Face Of The State's Complaint

While this country's recognition of Indian tribal sovereignty antedates the United States Constituion, it was expressly acknowledged in the often cited Indian Commerce Clause, which provides that the Congress shall "regulate commerce . . . with the Indian tribes." Judicial decisions interpreting this provision have come to form federal common law as it relates to Indian sovereignty. It has been said "as distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; " . . . *Western Union Tel. Co. v. Call Publ. Co.*, 181 U.S. 92 (1901). The federal courts have carved out the meaning and perimeters fo the sovereignty of Indian tribes down through the years commencing with the so-called Marshall Trilogy[3] up to *California v. Cabazon Band of Mission Indians*, 480 U.S. ___, 94 L.Ed.2d 244 (1987). Concededly, the sovereignty of Indian tribes has seen limitations imposed on it in recent years, but the federal courts have not wavered regarding absolute immunity from unconsented suit, taxation of tribes on Indian trust lands, and the presence of state court jurisdiction being matters of federal law within the exclusive province of the Congress. *Cabazon* at N.17, *Puyallup Tribe*, supra at 172-173 (1977).

While this Court, as far as is known to Respondents, has not had an occasion to address the "arising out of"

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[3] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet. 1 (1831); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) (1832)

requirement of 28 U.S.C. §1441 where an Indian tribe was the movant, it has addressed the applicability of federal common law as the basis for federal question jurisdiction as it relates to 28 U.S.C. §1331. The test for each statute is essentially the same. *Franchise Tax Board v. Labors Vacation Trust*, 463 U.S. 1, 8-9 (1983); *Garrett v. Time – D.C. Inc.*, 502 F.2d 627, 629 (9th Cir. 1974), Cert. Den., 421 U.S. 913 (1975). This Court considered the meaning of "The laws . . . of the United States" as contemplated by §1331 in *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) and after reviewing a number of circuit court decisions concluded:

> "We see no reason not to give 'laws' its natural meaning . . . and therefore conclude that §1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."

The question first arose in the context of federal Indian law in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974). This court said:

> "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and *absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.*" (emphasis supplied)

See also *The New York Indians*, 5 Wall. 761, 69, 18 L.Ed. 708 (1866).

In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850 (1985) the Court held that where limitations on Indian tribal sovereignty and the extent to which it has been curtailed are at issue, the case arises out of federal common law. Mr. Justice Stevens, speaking for a unanimous court, said:

> " . . . It is well settled that this statutory grant of 'jurisdiction (section 1331) will support claims founded upon federal common law as well as those of a statutory origin'."

An inquiry into whether Congress has in fact limited tribal sovereignty in a given case necessarily triggers

federal concerns. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). There are no federal statutes which make Oklahoma's statutory or decisional laws applicable to the Chickasaw Nation in its activities on its trust lands and, therefore, the controlling law in this matter remains federal common law. *Oneida* at 674.

This Court found in *Oneida* that the complaint basically alleged a state cause of action for possession and ejectment. Id. at 683. However, it determined the possessory rights asserted were federal in nature and said " . . . we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law". The court emphasized that the "underlying right" to the possession sought did not "arise[s] only under state law". Id. at 676. Petitioner is asserting that the "underlying right" to impose Oklahoma's tax laws on the tribe and of its courts to assume jurisdiction of tribal governments arises from the state statutes cited in its complaint. Therein lies the federal question.

The tribal sovereignty the Petitioner's complaint seeks to limit is not only protected and guaranteed by the federal common law but federal statutes and treaties as well. (The treaties and statutes not codified in the United States Code cited herein are contained in a separate appendix filed with the Clerk of the Court.)

The chief concern and consideration of the Chickasaw Nation for removal to Indian territory was the desire to be free of state jurisdiction and control. The preamble to their first treaty dealing with removal provides in pertinent part:

> "The Chickasaw Nation find themselves oppressed in their present situation; by being made subject to the laws of the states in which they reside . . . "

Treaty of 1832 at Ponotoc, 7 Stat. 381. Article II of the Treaty of 1834, 7 Stat. 456, promised that if they would give up their lands east of the Mississippi:

> " . . . the government of the United States, hereby consents to protect and defend them against the *inroads* of any other tribe of Indians, and *from the*

Whites; and agree to keep them without the limits of any state or territory." (emphasis supplied)

When the Chickasaws were removed they were located on lands previously ceded to the Choctaw Nation in 1830 by the Treaty of Dancing Rabbit Creek, 7 Stat. 333. That treaty in its Article IV provided:

> "The government and people of the United States are hereby obligated *to secure to the said Choctaw Nation* of Red People *the jurisdiction and government of all the persons and property that shall be within their limits west, so that no territory or state shall ever have a right to pass laws for the government of the Choctaw Nation of Red People or their descendents*; and that no part of the land granted them shall ever be embraced in any territory or state but the *United States shall forever secure said Choctaw Nation, from and against, all laws* except such as from time to time may be enacted by their own National Councils not inconsistent with the constitution, treaties and laws of the United States; and except such as may, and which have been enacted by the Congress under the constitution are required to exercise a legislation over Indian affairs". (emphasis supplied)

Article I of the Treaty with the Choctaw and Chickasaw of 1837, 11 Stat. 573, provided the Chickasaws were to be assigned lands within the limits of the Choctaw Nation "to be held on the same terms that the Choctaws now hold it". The Chickasaw Motor Inn is situated on lands granted under these treaties. Concededly, that portion of these treaties which agrees that the tribal lands would not be included within a state or territory has been abrogated but the promise to be free of state law and jurisdiction remains until Congress should decide otherwise.

The treaty with the Choctaw and Chickasaw, 1866, 14 Stat. 769 re-established the tribes relationship with the United States after the Civil War. It provided for such things as abolition of slavery, reorganization and recognition of the tribal governments, possible future allotment of their lands in severalty, etc. Article 33 provided that if allotment was accomplished:

> "All lands selected as herein provided shall thereafter be held in severalty by the respective parties, and the unselected land shall be the common property of the Choctaw and Chickasaw Nations, in their corporate capacities, subject to the joint control of *their legislative authorities*." (emphasis supplied)

Article 39 promised that licenses to sell goods and provisions would never be required of the tribe:

> "No person shall expose goods or other articles for sale as a trader without a permit of the legislative authorities of the nation he may propose to trade in; *but no license shall be required to authorize any member of the Choctaw or Chickasaw Nation to trade in the Choctaw or Chickasaw country who is authorized by the proper authority of the nation, nor to authorize Choctaws or Chickasaws to sell flour, meal, meat, fruit, and other provisions, stock wagons, agricultural implements, or tools brought from the United States into the said country*." (emphasis supplied)

The Petitioner's complaint likewise raises the federal question as to whether this treaty provision deprives the state court of subject matter jurisdiction. It goes to the heart of the claim that Petitioner can enforce its tax laws and require the tribes to purchase sales tax licenses and tobacco sales permits. While much of this treaty has been abrogated, Respondents submit that this provision remains in full force and effect as a solemn binding promise of the United States.

Finally, Article 45 of this treaty provides:

> "All the rights, privileges, and immunities heretofore possessed by said nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

Petitioner's complaint requires the application and interpretation of all of the aforegoing treaty provisions.

The Chickasaws sovereignty is also beneficiary to Oklahoma's Enabling Act of 1906, 34 Stat. 267 §1. The proviso to this section states:

" . . . provided, that nothing contained in the said constitution shall be construed *to limit or impair the rights of persons or property pertaining to the Indians of said territories* (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreements, law, or otherwise, which it would have been competent to make if this Act had never been passed." (emphasis supplied)

This is a clear expression by Congress that it fully intended to retain protective authority over Indians and their governments. *Ex-parte Webb*, 225 U.S. 663, 683 (1912).

Respondents submit that federal question jurisdiction appears on the face of Petitioner's complaint. (JA 1) The style or caption of the complaint gives the first clue. It says that it is filed in a state district court, that the Oklahoma Tax Commission is plaintiff and one of the defendants is the "Chickasaw Nation". The complaint alleges that an Indian tribe is "refusing" to obey state laws. The prayer for relief seeks an order enjoining the conduct of an Indian tribal government. This conspiciously informed the district court that the State was seeking to impose its sovereignty to limit tribal sovereignty in a state court. Inquiry as to the federal source of this right and the subject matter jurisdiction of the court becomes immediately necessary. The respective rights of each have their origins in and are governed by federal law. Well-pleaded complaint? Appellees submit not. While the "artful pleading rule" will subsequently be more fully discussed, it is submitted that the complaint is probably not even artfully pleaded, the federal question is so apparent. In fact, federal question jurisdiction should not escape a law student who has completed the first basic course in Indian law.

Petitioner has selectively extracted passages from *Gulley v. First National Bank*, 299 U.S. 109 (1936) in its protestations concerning lower court rejection of its well-

pleaded complaint theory. It contends that *Gulley* provides a hard and fast rule requiring that only the language on the face of the complaint, taken literally, may be considered in determining whether federal question jurisdiction for removal exists. It is conceded that portions of *Gulley* support an absolutist approach, but Respondents do not believe that was Justice Cardoza's intention. If it was he would not have said:

" . . . Partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, the real substance of the controversy, has taken on a new significance. 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise *unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends*'." Id. at 113-114. (emphasis supplied).

However, *Gulley* is distinguishable on its facts. The basis for the alleged cause of action there was a contract promising to pay a tax imposed by state statute. The contract was created and governed by state law. The Court said that the possibility that a federal statute might bar the collection of the tax did not create a federal question. In the present case, the underlying cause of action, if one exists, is entirely dependent on federal law, i.e. Congress must confer state authority to tax Indian tribal governments and subject matter jurisdiction on state courts to enforce the tax. The states have no power to create such a cause of action or jurisdiction.

Petitioner would have the federal courts apply selective portions of *Gulley* to the exclusion of the complete preemption and artful pleading exceptions to the well-pleaded complaint rule by ignoring the real nature and substance of this case. However, this argument is untenable because these exceptions were developed over thirty years after *Gulley* and the Court there even recognized a need for flexibility as is demonstrated by the above quoted passage. The federal nature of the right to be

established is controlling. *Gulley*, Id. at 114. Clearly, the underlying right to the claim asserted by the State has its very underpinnings in federal law, not state law. *Oneida*. Indeed, it is federal law that must breathe the first breath of life into those claims. That initial breath that is the "underlying right" can never have its origins in state law until Congress says otherwise. The "state statutory baggage" referred to by the Circuit Court in its first decision (JA 17) is only secondary and incidental to the resolution of this dispute.

"To reach the underlying law we do not travel back so far" *Gulley*, id. at 116, because of the federal nature of the right asserted. Likewise, "this is not a case where the *underlying right* or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation as was the case in *Gulley*" as this Court said in *Oneida* at 675. There are no state law causes of action against the Chickasaw Nation. Moreover, the complaint here meets the additional demand that it reveals a "dispute or controversy respecting the validity, construction or effect of law upon the determination of which the result depends." Id. at 677.

The Petitioner asserts that in order to be removed the alleged cause of action must be created by federal law. Assuming, arguendo, that the cause of action alleged here is created entirely by state law and the underlying right to assert it is immaterial, *Franchise Tax Board* provides an alternative basis for removal. It is found in the same sentence of the opinion with the rule relied on by Petitioner. At page 28 this Court said "or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law". The federal issues in this case are not insubstantial. Indian sovereignty and all its attending attributes are indeed important and can only be limited or extinguished with the consent of the federal government. *Wold Engineering*, supra at 890-891. Surely it cannot be seriously asserted that immunity from suit, which is so vital to tribal self-governance, and the federal trust relationship, is not as important as rights to land were in *Oneida*. If states could unilaterally confer

authority to themselves over Indian tribal governments and jurisdiction on their courts to enforce their authority, the tribes would govern nothing and congressional plenary power and the federal government's trust responsibilities would be meaningless. The federal question arises, in the first instance, in asserting the right to limit the Chickasaw Nation's sovereignty and therefore, facially presents removal jurisdiction based on federal common law, statutes, and treaties.

In addition to those matters heretofore discussed this case involves a very serious federal issue as to whether the rights asserted involve a political question and are therefore nonjusticiable. This will be discussed more fully in the second proposition. As was so elaborately developed in Petitioner's brief, the availability of the relief sought turns entirely on federal common law as established by this Court, congressional intent, treaties, and the Indian Commerce Clause, supra. The federal district court would have had original jurisdiction in this case had it been initially filed there. *National Farmers Union, Merrion*, etc. The issues presented clearly arise out of "the laws" and the federal district court could have proceeded to determine them had it not been without in personam, subject matter, and derivative jurisdiction for purposes of removal.

B. The Well-Pleaded Complaint Rule Is Inapplicable In This Case Because Petitioner Has Attempted To Artfully Plead A Cause Of Action Completely Pre-Empted By Federal Law

The first time certiorari was granted, this Court vacated the lower court's decision and remanded for reconsideration in light of *Caterpillar*, supra. The Circuit Court on remand, found *Caterpillar* "inopposite to the facts in this case and adhered to its original ruling that the well-pleaded complaint rule did not apply."

In *Caterpillar* plaintiffs were hired by a tractor company to fill positions covered by a collective bargaining agreement. Their employment was eventually changed to

positions outside the coverage of the collective bargaining agreement. During this period the tractor company allegedly created implied individual employment contracts with plaintiffs by making representations that they would have indefinite employment and that if that facility were closed employment would be provided at other locations. Plaintiffs were subsequently returned to an employment status covered by the collective bargaining agreement. Thereafter, they were told the plant would be closed and they were to be laid-off. Rather than pursue their federal remedies under the collective bargaining agreement, plaintiffs optioned to sue on the alleged implied individual employment contracts created while they were in positions outside the bargaining agreement. The tractor company removed to federal district court arguing that removal was proper because any individual contracts made with the plaintiffs "were as a matter of federal substantive labor law, merged into and superseded by the . . . collective bargaining agreements." The Court determined that this was raised as a defense and removal was improper based on the well-pleaded complaint rule.

Caterpillar is distinguishable from the instant case for a number reasons. First, the Court in *Caterpillar* found that the plaintiffs had a choice of asserting a claim founded on state law or on federal law and, as "masters of their claims" chose the former by alleging breach of the individual contracts. Here state law does not provide an alternative forum. Petitioner sued a federally recognized and protected Indian tribal government asserting the right to enforce its laws against it and to limit its federally conferred immunity from suit, rights governed entirely by federal law. There is no state law cause of action available to the petitioner absent federal statutes making state decisional and statutory laws applicable to Indian tribes and their officers. *Oneida*.

Secondly, this court found removal improper because the federal substantive labor law was injected in *Caterpillar* by way of a defense. This is clearly the rule. However, the sovereignty of the Chickasaw Nation is not raised first by way of defense. It is the federal nature of the rights Petitioner seeks to limit and its attempt to assert

state court subject matter jurisdiction over an Indian tribe that causes the federal question to emerge.

Thirdly, this court found in *Caterpillar* that the complaint was "not substantially dependent upon interpretation of the collective bargaining agreement". Here the State's complaint is entirely dependent upon interpretation of federal law. The state statutes which are merely incidental to the underlying federal rights at stake, do not require any interpretation. Once the core federal questions are decided, the application of the state statutes, if permitted, will simply follow.

Finally, the plaintiffs in *Caterpillar* could not have filed their complaint in federal court based on the theory advanced because the federal courts do not have original jurisdiction over state law causes of action for breach of contract. However, the Petitioner's complaint here clearly asserts the right to limit Respondents' sovereignty. Such right, if it exists at all, must be created and governed entirely by federal law and, therefore, meets the "arising out of" requirement for federal question jurisdiction. *Oneida* and *National Farmers*, supra.

(1) Petitioner's Complaint is Thus Far an Unsuccessful Attempt at "Artful Pleading" to Close-off Respondents Access to a Federal Forum

While not expressly characterizing it as "artful pleading" the Circuit Court clearly found the State was attempting to conceal a necessarily federal cause of action for the purpose of closing off Respondents' access to the federal court. Judge Moore in the Circuit Court's first decision in this case said:

> "The State urges us to scrutinize the face of its complaint and hold that no federal question is present to permit removal . . .
>
> We are unswayed . . . mindful instead that our inquiry into whether a federal court has removal jurisdiction and whether it may exercise its limited substantive jurisdiction is not perforce bounded by the face of the complaint. Indeed when the state plaintiff couches his 'necessarily federal cause of action solely in state law terms . . . *the federal removal*

court will look beyond the letter of the complaint *to the substance of the claim to assert jurisdiction.'* 14A Wright, Miller, & Cooper, *Federal Practice & Procedure* §3722 at 243 (1985).

The substance of the State's claim embraces the central jurisdictional issue we must decide in this appeal. *Indeed, when we strip the State's complaint of its statutory baggage, we are left with an action in which the State is attempting to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe.*

This recognition underscores the implicit federal question lodged in the State's complaint and focuses our inquiry (omitting citations)." 822 F.2d 951, 954. (emphasis supplied)

On remand, the Circuit Court said:

"The named defendant is the Chickasaw Nation, a sovereign entity whose status is subject to and limited by congressional power alone . . .

The State attempted to 'well-plead' its complaint by envoking only state revenue laws and thereby avoid the 'Chickasaw Nation's sovereign status. However, the complaint is not well-pleaded' and consequently falls outside the boundaries *Caterpillar* set." 846 F.2d 1258, 1260.

This Court acknowledged the "artful-pleading" rule in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 (1981). At footnote 2 of Chief Justice Rehnquist's opinion for the Court, he said:

". . . as one treatise puts it, courts 'will not permit plaintiffs to use artful pleading to close off defendants' right to a federal forum . . . occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization', 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §3722, pp 564-566 (1979).

. . . The District Court applied that *settled principal* to the facts of this case . . . " (emphasis supplied)

There is nothing to prevent a court from "engaging in a little statutory logic" to deduce elements implicit on the face of the complaint. *Charles D. Bonanno Linen Service Inc.*

v. McCarthy, 708 F.2d 1, 4 (1st Cir. 1983), Cert. Den., 464 U.S. 936 (1983). The recitation of a series of state statutes should not render the federal courts mindless so they may not use logic to deduce elements of a federal claim implicit on the face of a complaint. Nor should such practice be allowed to defeat or frustrate the intent and plenary authority of Congress.

Subject matter jurisdiction cannot be waived and should be affirmatively shown. *Gainsville v. Brown Consumer Invest. Co.*, 277 U.S. 55, 59 (1928). Tribal sovereign immunity is jurisdictional. *Ramey Const. Co. v. Apache Tribe of Mescalero Reserv.*, 673 F.2d 315, 318 (10th Cir. 1982); *People ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154 & N.1 (9th Cir. 1979). A judgment by the ocurt without subject matter jurisdiction is void. *State ex rel. Hunt v. Green*, 508 P.2d 639, 642 (Okl. 1973). The Court does not acquire subject matter jurisdiction merely because a defendant fails to raise it as a defense. Therefore, it is immaterial whether it is raised as defense or not. The burden is on the petitioner to establish jurisdiction and not on the Court or Respondent to show its absence. Jurisdiction " . . . must affirmatively appear on the record". *Roberts v. Jack Richards Aircraft Co.*, 536 P.2d 353, 354-355 (Okl. 1975); *Crescent Corporation v. Martin*, 443 P.2d 111, 117 (Okl. 1968). The Circuit Court below found the complaint was not well-pleaded because jurisdiction was not affirmatively alleged. A litigant has a duty to the courts to be candid and to allege matters it knows are essential to jurisdiction. It should not play fast and loose with the Court and assert claims and name parties over which it knows the state court does not have jurisdiction. It is astonishing that Petitioner continues to play this exercise in cleverness to the hilt, straight-facedly "nothing was concealed in the State's petition" and that "the Federal Government takes no responsibility" in the tribe's business as though the federal trust relationship was meaningless. (Pet. Brief, p.9)

It should be noted that there is a reason which was quite apparent to the lower courts why this unusual

attempt was made to try the Chickasaw's sovereignty in an Oklahoma state court. The Petitioner was certainly cognizant of the long line of decision by this Court and other federal courts that adhere to the time-honored and settled rule that Indian tribes are immune from suit unless such immunity is expressly and unequivocally waived by the tribe or congress. Petitioner knew or should have known that an attempt to bring this action in the federal courts would have met with immediate doom. However, it saw another possible way to skin this cat. In 1985 the Oklahoma Supreme Court had, unprecedently and contrary to the decisions of this Court expressly holding otherwise, decided that a state district court had subject matter jurisdiction over the Seneca-Cayuga Tribe of Oklahoma for the purposes of regulating bingo on Indian country. *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77 (Okl. 1985). As far as respondents know, this decision has been ignored by all federal courts in which it has been cited as authority. While the Court's reasoning one some of the issues was sound, the ultimate holding that a state court had jurisdiction over a federally recognized tribe on Indian country was consummately wrong. The Court misapplied *Wold Engineering*, supra; erroneously applied the pre-emption – infringment tests to immunity from suit and confused sovereignty in general with sovereign immunity from suit. It has been termed as "misguided" by the United States District Court for the Northern District of Oklahoma.[4] Labeled "confused and obscured" by one noted Indian law scholar[5]

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[4] *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, No. 85-C-639-B (ND Okl. 1986) where the state district court on remand was subsequently enjoined from exercising jurisdiction. (App. 33 Respondents' brief in opposition to Pet. for Cert.)

[5] C. Goldburt-Ambrose, *Public Law 280 – Termination to Self-Determination*, paper presented at a seminar entitled "The American Indian in Comtemporary Life: An Examination of Relationships Between Cultural Values and American Indian Policy", February 21-22, 1985, at the University of California at Los Angeles – American Indian Studies Center.

and criticized by another for its misapplication of settled federal law, especially in its application of the pre-emption – balancing approach as it related to tribal sovereign immunity from unconsented suit.[6] *May* was decided on July 2, 1985, and the present case filed in state court on October 18, 1985. *May* appears to have inspired the present case and is the reason the Petitioner has struggled so arduously to return it to the state court. If it is successful in returning this case to a court more receptive to assuming jurisdiction it will gamble on the odds that the Oklahoma Supreme Court will not reverse its decision in *May* and certiorari may not be granted in this Court.

(2) Petitioner's Claim is Completely Pre-empted by Federal Law

In some areas of the law congressional involvement and federal common law may be so powerfully pervasive as to completely pre-empt, and even displace, state law and jurisdiction. In the context of congressional involvement preemption may be evidenced by intent, direct or indirect, or by establishing a regulatory scheme which is

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[6] Dennis W. Arrow, Professor of Law, Oklahoma City University, *Comtemporary Tensions in Constitutional Indian Law*, 12 Oklahoma City University Law Review 469, 550-551 (1987). Professor Arrow says:

> "Essentially, the court applied preemption-balancing to override tribal sovereign immunity. This approach, however, is not supportable for several interrelated reasons. Initially, as has been noted, supreme court protection of tribal sovereign immunity has been vigorous. In *McClanahan*, the court noted that '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' In *Santa Clara Pueblo v. Martinez*, it held that 'without congressional authorization' the 'Indian Nations are immune from suit.' In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, it reaffirmed that 'in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.' Sovereign immunity, in short, is an independent doctrine, not subject to the preemption-balancing approach."

incompatible with state action. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. ___, 95 L.Ed.2d 55, 63 (1987) this Court said that a corollary to the well-pleaded complaint rule is that "Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character". See also *Caterpillar* at 327. Citing *Franchise Tax Board*, the Court in *Caterpillar* also said:

> "On occasion, the court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. (omitting citations) Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. See *Franchise Tax Board* . . . ('If a federal cause of action completely pre-empts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under federal law')."

See also N.8 Id. at 96 L.Ed.2d at 328 where *Oneida*, supra, is cited by way of example. In *Franchise Tax Board*, supra, the court recognized the rule that emerged in *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968) that " . . . it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint . . . " Id. at 22.

Perhaps by way of some sort of impermissible implied jurisdictional interpretation making it applicable to an Indian tribe, Petitioner cites 68 Oklahoma Statutes § 232 providing for injunctive relief to enforce state tax laws as its authority for this suit. The federal statute authorizing state court jurisdiction over Indian country is the Act of August 15, 1953, 67 Stat. 5888, as amended, 28 U.S.C. § 1360 and 25 U.S.C. § 1322, commonly known and hereinafter referred to as Public Law 280. Public Law 280 completely pre-empts the Petitioner's claimed state statutory cause of action against Indian tribes. This Court

recently spoke to this proposition in *Wold Engineering*, supra at 884-885 where North Dakota, a Public Law 280 state, sought to disclaim state jurisdiction for a claim brought be an Indian tribe unless the tribe waived its sovereign immunity from suit. Justice O'Conner speaking for the majority of the court said:

> "Public Law 280 represents the primary expression of federal policy governing the assumption by states of civil and criminal jurisdiction over the Indian Nations . . .
>
> . . . In examining the effect of comprehensive legislation governing Indian matters such as this, "our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition the pre-emption requires 'an express congressional statement to effect'. (omitting citations)
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> . . . Rather, we have found that where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled pre-empted by federal law." (omitting citations)

Oklahoma has never met the requirements of Public Law 280. *May* at 88, supra. Petitioner's attempt at an application of state statutes in a state court to enjoin tribal activities is completely incompatible with the pre-emptive force of Congressional perogative. Simply naming an Indian tribe as a party defendant in a suit immediately raises the pre-empted federal issue of subject matter jurisdiction.

Moreover, as a matter of federal common law, the Court said in *Wold*, "Chapter 27-19's requirement that the tribe consent to suit in all civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the tribe is a necessary corollary to Indian sovereignty and self-governance". The Court then said:

> " . . . and this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition . . . nonetheless, in the absence of federal

authorization, tribal immunity, like all aspects of sovereignty, is privileged from diminution by the states."

In a later enactment the Congress spoke more directly to its policy on the sovereign immunity. The Indian Self-Determination and Education Assistance Act, Public Law 93-638, Jan. 4, 1975, 88 State 2213 codified at 25 U.S.C. 450(N) provides:

"Nothing in this Act shall be contrued as –

(1) affecting, modifiying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an by an Indian tribe; . . . "

This is not some casual, out-of-hand statement by the Congress but a further declaration that it intends to continue to control and define substative rights to invade this aspect of tribal sovereignty.

By the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1302 Congress authorized Habeas Corpus relief against tribal officials where constitutional rights have been violated. Adoption of these and many, many other federal laws in futherance of the federal trust responsibility show with great clarity that Congress, perceives itself as having final and complete dominion over Indian tribes. The most direct statement of congressional intent regarding state authority is found in Oklahoma's Enabling Act, supra, where Congress specifically reserved authority over Indian rights and lands in Oklahoma.

The cumulative effect of federal case law dealing with taxation of Indians, immunity from suit and subject matter jurisdiction of the courts, particularly the state courts, also overwhelms state law. Although, *Oneida* supra, involved federally protected rights to land the holding there is no less relevant to the Chickasaw's right to federally protected attributes of sovereignty. There the Court's recognition of the complete preemption of federal law regarding tribal sovereignty was vividly enunciated when the Court declared federal law absolutely controlling absent Congressional edict applying state laws and jurisdiction. Id. at 674. In the present case, even if the federal statutes developing a regulatory scheme for

assuming state jurisdiction and manifesting Congressional intent did not completely pre-empt state court jurisdiction it is clear that federal common law necessarily would.

Although, erroneously characterizing the sovereign immunity issue as a "defense"[7], the dissent below recognized complete federal pre-emption in this case when Judge Tacha said "It is undisputed that federal law completely pre-empts this field". 846 F.2d 1258, 1261. Petitioner's asserted right to enforce its tax laws via coercive state court jurisdiction and, as the case was here, the state court's predisposition to exercise it by unnoticed ex-parte injunctive relief, is inconsistent with this Court's frequent holding that Congress retains plenary authority to decide when such right may exist. Complete pre-emption requires that any decision, as to whether Congress intends such right to exist, remain within the realm of federal court jurisdiction.

The federal common law as developed by this Court, the Indian Commerce Clause, Acts of Congress, and it plenary authority in this area and the federal trust responsibility operate to completely dominate and displace any state cause of action involving Indian tribes even if it existed. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. ___, 95 L.Ed.2d 55, 63 (1987). Although it has not done so often, the Congress has demonstrated when it is disposed to confer jurisdiction over Indian tribes it will do so. See Public Law 280; Indian Civil Rights Acts of 1968, 25 U.S.C. § 1301-1303; The Five Civilized Tribes Act of April 26, 1906, 34 Stat. 137, 144 § 18. And it has manifestly warned when it did not intend for its legislation Acts to be misapplied to confer jurisdiction. Indian Self-Determination Act, 25 U.S.C. § 450(N), supra. It

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[7] Respondents assert that Judge Tacha was wrong for the reasons previously stated herein and because to characterize sovereign immunity as a defense would imply that the courts would have subject matter jurisdiction over Indian tribes absent their asserting sovereignty.

would be purposeless for Congress to undertake such legislative measures unless it intended that federal law absolutely control in this regard. Respondents submit that federal influence in this field has the same powerful preemptive force as the labor laws involved in *Avco* and *Metropolitan Life*, supra.

Avco, also addresses Petitioner's complaint that if it is unable to bring this action in state court it will not have a remedy. There the Court found the absence of a federal remedy was not determinative in regard to the propriety of removal saying " . . . The broadth or narrowness of the relief which may be granted under federal law . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter". Id. at 561. See also *Franchise Tax Board*, Id. at 23 and *Caterpillar*, Id. at 96 L.Ed.2d 326, N.4.

The Chickasaw Nation should not be required to have its sovereignty tried in the state courts anymore than the state should have its sovereign powers tried in the courts of the Chickasaw Nation. The Court should affirm removal of this case to the federal district court.

II. RESPONDENTS' SOVEREIGN IMMUNITY FROM UNCONSENTED SUIT DEPRIVED THE STATE AND FEDERAL DISTRICT COURTS OF SUBJECT MATTER AND IN PERSONAM JURISDICTION MANDATING DISMISSAL

As the Tenth Circuit Court correctly stated in its initial decision in this case "Tribal sovereign immunity is jurisdictional". 822 F.2d 951, (10th Cir. 1987) See also, *Ramey Const.*, at 318, and *Quechan Tribe of Indians*, at 1154 & N.1, supra. Tribal immunity from suit is unconditional and the absence of an effective waiver deprives the courts of subject matter jurisdiction. In this case Petitioner attempts an ambitious effort. It seeks an absolute coup d'etat for the State of Oklahoma to finally and forever obtain complete authority to enforce its tax laws against all Indian tribes residing in the state. It urges this Court

to, in a single master stroke, abolish tribal immunity from suit without regard to the will of Congress.

With the exception of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) which had nothing to do with immunity from suit, Petitioner relies on decisions involving individual Indians rather than tribal governments for the proposition that immunity from suit territorially limited. Respondents submit that this attribute of sovereignty for tribal governments is a governmental one, not subject to limitation absent an express act of congress. Whether the conduct complained of occurs on a reservation, Indian country, or Indian lands is immaterial for immunity from suit to exist. However, Respondents cannot permit petitioner's assertions in this regard to go unanswered and address them as follows:

A. The Chickasaw Reservation in Oklahoma Has Not Been Disestablished By Congress

Petitioner asserts the novel theory that Oklahoma Indian tribes are less deserving of governmental recognition and attending sovereign attributes than other tribes in the United States.[8] Petitioner's sweeping proposition to limit tribal sovereign immunity from suit based on geographical or territorial considerations is totally unprecedented, judicially or legislatively. It rests it's position principally on *Mescalero* which did not deal with the tribe's sovereign immunity from suit. There the tribe initiated the proceedings resulting in the Court's decision. This case will be discussed in greater depth further on.

As was noted in the courts below, Petitioner has not cited a single decision of this or any other federal court nor any Act of Congress whereby the state courts of Oklahoma acquire subject matter jurisdiction in this case to enforce tax laws or Indian tribal immunity from suit is

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[8] Under petitioners theory Oklahoma Indian tribes would not be the only tribes subjected to state court jurisdiction. There are many other tribes in other states whose lands have been allotted in severalty and reservations settled by non-Indians.

in anyway qualified territorially. Rather, it cites decisions dealing with other aspects of tribal sovereignty, most of which except *Mescalero*, involve rights and immunities of individual Indians as opposed to the sovereignty of their governments. As this Court noted in *Oneida* when urged to apply the well-pleased complaint rule in *Taylor v. Anderson*, 234 U.S. 74 (1914) the rules are different when applied to rights of individual Indians as opposed to rights of an Indian tribe, Id. at 676.

It is true that the United States Government during the assimilationist period engaged in a policy leading to termination of Indian tribes. As has been noted by most historians and scholars, this was a sad period in American history and it is a poor background on which to ask this court to extract such a vital aspect of tribal sovereignty. Petitioner relies principly on a case not involving sovereignty of a tribal government, reports of the Dawes Commission and the Curtis Bill, Act of June 28, 1898, 30 Stat. 495, to make its sweeping assertion that Oklahoma's Indian tribes should not have sovereign immunity from suit because their "reservations" were disestablished. Respondents submit that this is a less than comprehensive background on which this Court should make a decision resulting in such a brutal impact on Oklahoma's Indian tribes.

Petitioner contends that the cited Dawes reports "paint[s] a vivid picture of congressional intent to disestablish all reversations in Oklahoma" (Pet. Brief, p.25) and that the "statesmenship" practices (Pet. Brief, p.38) by the Dawes Commission destroyed all immunities for tribal governments in Oklahoma. Respondents suggest that a more vivid picture of Dawes effort is illustrated by the noted Indian scholar and author, Angie Debo, in her book *And Still the Waters Run*, Princeton (1940) 91:

> " . . . As the federal officials began to realize the vast helplessness and inexperience of the average Indian, they began, through a blundering process of experimentation, to try to guard his property. But because of the lack of a definite and constructive policy, and most of all because the inherent difficulty of the task

> itself, the general effect of allotment was an orgy of plunder and exploitation probably unparalleled in american history."

and another leading author of the times, commented on the reports of the Dawes Commission that claimed it was the fault of the Indians that necessitated break-up of the reservations and allotments in severalty he said:

> "The truth is that when the Five Civilized Tribes were driven from their ancient homes east of the Mississippi to make room for the early settlers, the country selected for them, and called the Indian Territory, was thought to be a wild and barren country and was then subject to the inroads of the wild roving bands of plain Indians, making life there insecure. After these savages were conquered and the country made secure and habitable by the Five Civilized Tribes, not only the great agricultural possibilities of the country became a striking fact, but, in addition, vast deposits of coal, oil, and gas were discovered. Then it was that, whetted by cupidity, the whites became as hungry wolves, seeking all they could devour, and intruders overran the Indian country, while the United States, which acknowledged the helplessness of the Indians, and its duty by treaty and morally to exclude the intruders, with the power so to do, quietly looked on and did nothing. Hence the Dawes Commission" James H. Malone, *The Chickasaw Nation*, John P. Morton & Co., (1922) at 424.

Angie Debo, also commented on the credibility of the Dawes Commission in her work, *A history of the Indians of the United States*, Univ. of Oklahoma. Press, (1970), p. 307:

> "It published annual reports, and its members testified before congressional committees and made speeches throughout the United States. These statements accurately depicted the inconveniences of the white population, but flagrantly misrepresented the condition and sentiments of the Indians and in a high moral tone urged the abolition of their institutions as a deliverance to them. Greed, philanthropy, and public opinion were thus united to break down the tribes' defenses. What might have been advocated as

a measure of cold-blooded realism was represented a holy crusade."

Respondents agree that the courts look to legislative history to ascertain congressional intent to disestablish a reservation, but it must be remembered that these reports, to which Petitioner devotes more than one-fourth of its brief, are not congressional committee reports. They are simply reports of a commission established to further assimilationist policies of the times by persuading the tribes to allot their lands in severalty and thereafter implement the allotment process. More importantly it should not go unnoticed that Petitioner is unable to cite a single congressional act in which the congress explicitly disestablished the Chickasaw Nation's reservation. This Court in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) reiterated the rule that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909) Simply alloting the lands out in individual plots within the area does not change it's reservation character.

A study of the legislation cited by Petitioner resulting in allotment of the Chickasaw lands finds no expression on the part of Congress to disestablish the tribe's reservation.[9] Essentially these Acts of Congress provided for allotments in severalty to tribal members and sales of surplus lands for an undisclosed sum to be deposited for the benefit of the tribe. The tribe retained some lands including schools, churches, tribal government buildings, mineral rights, etc. The tribe continues today, to own and

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[9] We specifically refer to the Act of June 28, 1898 (Curtis Bill) 30 Stat. 495; Oklahoma's Organic Act of 1890, 26 Stat. 81; Five Tribes Act of April 26, 1906, 34 Stat. 137; and Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267. (The text of these Acts are included in the separate appendix filed by Respondents with the Clerk of the Court.)

occupy surplus lands that were not sold.[10] There is not doubt that the sales of surplus land were not for the purpose of facilitating non-Indian settlement on the reservation but that does not manifest congressional intent to disestablish it. The dealings with the Chickasaws was akin to the situation in *Mattz v. Arnett*, 412 U.S. 481 (1973) where the Court held that an Act opening lands for settlement, alloting lands to tribal members and sale of the surplus for an undisclosed sum to be deposited for the tribes benefit did not evidence an intent to terminate the reservation status of the entire area. It cannot be denied that members of Congress at the time of the Chickasaw allotment process probably thought that this would eventually terminate tribal existence. But, as this Court said in *Solem* at 468, "the Congresses that passed the Surplus Land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process. We have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations . . . "

A few years later the country began to take a dim view of these harsh and unworkable termination and assimilationist policies. The advent of a new policy, as it related to the Chickasaws, came with the Oklahoma Indian Welfare Act of 1936, supra. The OIWA stopped the allotment of Oklahoma's Indian lands and allowed the tribes to reorganize their shambled governments. This brings us back to the Curtis Bill, supra, which Petitioner asserts as authority for the proposition that Congress has disestablished all reservations in Oklahoma making it an "assimilated state". Apparently it is not aware of *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988)

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[10] Contrary to Petitioner's uninformed statement concerning Indian County on page 29 of its brief, the Chickasaw government retains more than 2500 acres in tracts ranging from a few acres to over 700 acres. This does not take into account thousands of acres of individually retained allotments. The Choctaw tribe retains almost 12000 acres in trust lands together with thousands of acres of individual allotments.

where the Court held that the OIWA repealed the Curtis Bill for all purposes. Reversing the district court's holding that the Creek Nation had no authority to establish tribal courts with civil and criminal jurisdiction because of the Curtis Act, the circuit court said:

> "It (OIWA) appears to cover the 'whole subject' of the earlier legislation. It would be absurd to hold that isolated portions of the Curtis Act . . . survive even through the statutory context in which they appeared – allotment and assimilation – has been stripped away by OIWA." at 1445.

Whatever the Congress might have done earlier the notion of Oklahoma being an "Assimilated state" as termed by Petitioner, was laid to rest in 1936.

Respondent's cannot allow the misinformation from Senate Report No. 1232, 74th Congress, 1st Sess., July 29, 1935, quoted on page 25 of Petitioner's brief to go without comment. The cited passages from that report involved a proposed bill considered by Congress in the 1938 session similar to the 1936 OIWA that was adopted. The bill proposed in 1935 was never adopted because it contained erroneous information about the status and condition of Oklahoma Indians and objectionable features purporting to treat Oklahoma Indians different from those to which the Indian Reorganization Act 25 U.S.C. 465 et seq. covered. Petitioner cites the legislative report on the failed bill as authority that "Congress recognized that no reservations survived Statehood" and the Oklahoma Indians were to be treated differently from tribes covered by the IRA. The following are some passages from the report submitted by the House Committee on Indian Affairs during the 1936 session which resulted in passage of the OIWA:

> "During the last session of Congress the Committee on Indian Affairs had before it H.R. 6234, a bill similar in purpose but containing many objectionable features. The Senate bill, as passed by the Senate on August 16, 1935, embodied some of the objectionable provisions . . . This bill, in its *revised form*, has the endorsement of the Department; it has been advocated by representatives of numerous Indian groups;

> it is unanimously favored by the Oklahoma delegation in the House, and was unanimously reported by your committee.
>
> This bill affects the welfare of approximately 125,000 Indians representing about 30 different tribes. This is more than one-third of the total Indian population of the United States. There is a popular impression that the Oklahoma Indians are wealthy. Such is not the case. Generally speaking, the Oklahoma Indians are living in total poverty on land unsuitable for cultivation, and with work opportunities nonexistent. Enactment of this legislation will open the door for many of these poverty-stricken people.
>
> Section 1 of the proposed substitute bill authorizes the acquisition of lands, either within or outside the boundaries of *existing reservations* or nations . . .
>
> * * *
>
> By section 2 a preference right is granted the Secretary of the Interior to purchase restricted Indian land offered for sale. Exercise of this authority will permit continued Indian ownership of the land rather than to have it pass to white purchasers, and thus to increase the extremely unsatisfactory checkerboard ownership situation which has developed through past practices in disposing of surplus of heirship Indian land.
>
> Sections 3, 4, and 5 extend to the Oklahoma Indians the right to organize; to adopt constitutions; to receive charters; and to participate in loan funds and otherwise to enjoy the benefits of organization for general welfare purposes. *In other words, these sections will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934* . . .
>
> * * *
>
> In addition to the loan appropriation authorized by section 6, Oklahoma Indians, under the provisions of section 7 will also share in any or all appropriations heretofore or hereafter made to carry out the provisions of the Indian Reorganization Act of June 18, 1934. Thus appropriations for expenses of organization,

for land acquisition, for student loans, and for industrial loans, may be used for the benefit of Oklahoma Indians.

* * *

Section 9 authorizes the Secretary of the Interior to make all necessary rules and regulations for putting this legislation into effect. The last sentence of the section repeals any legislation inconsistent with the terms of this bill." (emphasis supplied) H. Rep. No. 2408, 74th Congress, 2nd Sess., April 15, 1936.

Respondents suggest that the above report would serve this Court better in determining the intent of Congress and what it believed in 1936 as to the status of reservations and Indians in Oklahoma.

Regardless of the destruction of the tribe's land base due to the assimilationist and termination policies of the United States in the late nineteenth century and contrary to the erroneous statement by petitioner on page 23 of its brief[11], the tribal governments, though seriously weakened, remained intact and the federal government retained jurisdiction over them. The Five Civilized Tribes Act of April 26, 1906, 34 Stat. 137 § 28 expressly provided that the tribal governments were continued "until otherwise provided by law". While it is true that the tribal governments were much restricted by these congressional acts and were not very effective for several years thereafter, it is clear that the tribal governments were continued. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911). This is further evidenced by Oklahoma's Enabling Act, supra.

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[11] "It is from this beginning that the state government assumed the jurisdiction over all citizens of the state with the concurred plenary power to tax all property unless specifically restrained by federal law." While it attempts to do so here, The State of Oklahoma has never assumed jurisdiction to tax Indians on Indian country.

The executive branch only recently recognized the continued existence of the treaty boundaries of the Chickasaw Nation when the Secretary of the Interior approved its present constitution in 1983. (JA 20) The preamble of the Chickasaw Constitution "establishes" the tribal government "within the . . . limits" of the original reservation. The Chickasaw Motor Inn is within those boundaries. Petitioners claim that the Chickasaw reservation has been disestablished is without merit. Even had it been, that situation was reversed by the OIWA. *Hodel.*

B. Indian Tribes Are Immune From Suits In State Courts As To Matters Arising On Indian Country And, Petitioners Tenth Amendment Rights Aside, The Congress Had Authority To Codify This Court's Definitions In 18 U.S.C. § 1511 For Jurisdictional Purposes

This Court does not have to decide whether the original Chickasaw reservation in Oklahoma has been disestablished because the term "Indian country" has come to be synomous with "reservations" for state, federal, and tribal jurisdiction purposes. Whether conduct of Indians has occurred on "Indian country" has increasingly become the benchmark for allocation of federal, tribal, and state civil and criminal jurisdiction. *California v. Cabazon Band of Indians*, 107 S.Ct. 1083, 1087 & N.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 & N.2 (1971); *Indian Country, U.S.A. Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) Cert. Den. sub nom *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, 108 S.Ct. 2870 (1988). See also F. Cohn, *Handbook of Federal Indian Law* 5-8 (1942). Congress has defined Indian country for purposes of determining federal criminal jurisdiction in 18 U.S.C. § 1151(a)(1982) to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . " The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1903(10) provides:

> "Reservation means Indian country as defined in section 1151 of title 18 and any lands, not covered

under such action, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;"

On September 26, 1988, the Congress passed Senate Bill 555, Indian Gaming Regulatory Act[12] Section 4(4)(B) of the Act defines "Indian lands" as:

> "Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power."

Section 23 of the Act uses the term "Indian country" interchangably with "Indian lands" a number of times.

This Court has designated lands as "Indian country" where title was held in a variety of ways. *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Chavez*, 290, U.S. 357, 364 (1933); *United States v. John*, 437 U.S. 634, 649 (1978). The principal test applied by the courts is found in *Pelican*, Id. at 449, i.e. tribally-owned lands "devoted to Indian occupancy . . . validly set apart for the use of Indians". This includes lands held in trust for a tribe by the United States. *John*, Id. at 649. This is also the test applied in at least four Circuits. *United States v. Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985); *Langly v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985); *United States v. Agure*, 801 F.2d 336 (8th Cir. 1986); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-668 (10th Cir. 1980); See also *State of Washington v. Sohappy*, 757 P.2d 509, 511 (Wash. 1988); and, in Oklahoma see *May*, supra at 82.

The Petitioner apparently made the same argument to the Circuit Court in *Indian Country, U.S.A.*, supra, that

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[12] Reported in the Congressional Record, September 15, 1988, at S 12657 et. seq. and September 26, 1988, at H 8146 et. seq. (The full text is reported as Document 9 in the separate appendix filed by Respondents with the Clerk of the Court.) It should be noted that any attempt to tax bingo revenues has been foreclosed by § 11 of that Act.

it does here, i.e. the Creek Nation reservation had been disestablished. The Court there said at 975 N.3:

> "The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not . . . *Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment.*" (emphasis supplied) See, e.g., *Solem*, 465 U.S. at 467 n.8, 104 S.Ct. at 1164 n.8; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085.

The terms "reservation" and "Indian country" are used interchangeably by the congress and the courts. The primary meaning of both terms is to describe "federally-protected Indian tribal lands." Cohen's *Handbook of Federal Indian Law* (R. Strickland Ed. 1982) at 35 n.66. Thus, the terms "Indian country" and "reservation" have come to mean "those lands which congress has set apart for tribal and federal jurisdiction". *Indian Country, U.S.A.*, Id. at 973. It should be noted that the Oklahoma Supreme Court has also recognized the importance of this classification:

> "The touchstone for allocating authority among the various governments has been the concept of 'Indian country', a legal term delineating the territorial boundaries of federal, state, and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained."

Ahboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625, 627 (Okl. 1983). See also *State v. Burnett*, 671 P.2d 1165 (Okl. Cr. 1983).

The Chickasaw Motor Inn property was conveyed to and accepted by the United States in trust. (JA 16) This was done for reasons that should be obvious. It was the intent of both the Chickasaw Nation and the United States Government that this tract of land would unquestionably be removed from the jurisdiction of the State of Oklahoma. The Petitioner has had much difficulty in accepting this as the Court pointed out in *Oneida*, at 678:

"There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians."

Mescalero, supra, on which petitioner almost places its whole case, when coupled with obiter dictum in *Oklahoma Tax Commission v. United States*, should not be applied here for several reasons. First, sovereign immunity from suit was not at issue in either case. Secondly, the leased lands involved in *Mescalero* were located outside tribe's recognized reservation. "Indian country" considerations aside, the Chickasaw Motor Inn is located within the exterior boundaries of its original reservation, Treaty of 1837, supra, and the territorial boundaries for its present day government which have been approved by the Department of Interior. (Chickasaw Constitution, preamble, JA 20). Third, New Mexico's Enabling Act makes a distinction between on and off reservation activities for taxing Indian tribes. *Mescalero* at 149-150. Oklahoma's Enabling Act has no such provision. Congress expressly granted New Mexico more powers over Indians than it did Oklahoma. Oklahoma's authority is restricted to the power given it by federal common law. The issue in Mescalero was whether the area was on or off a "reservation" as that term was perceived at the time New Mexico's Enabling legislation was drafted not "Indian country". Footnote 11 at 155 of the Court's opinion indicates the leased lands would be accorded the same "Indian country" status as lands purchased by or conveyed in trust to the United States. However, this conclusion was reached in an entirely different context than here. There the issue was whether taxes applied to both the improvements on the land and income therefrom. Here the issue is whether the state court's have subject matter jurisdiction over Indian tribes on "Indian country".

In *Mescalero*, the lands were not owned by the tribes but merely leased, with perhaps, the thought by the tribe that it would be immune from taxation as a federal

instrumentality. In according the leased lands the same status as purchased lands under the Indian Reorganization Act, 25 U.S.C. 465 the Court noted a statement of the Solicitor General that "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe". Id. at N.11. In the present case the Chickasaw Nation already owned the lands in question in fee. They subsequently conveyed them to the United States who accepted them in trust. Respondents submit that this was not without "meaning[less]" and that it was accomplished with the calculated intent of both the tribe and the United States to cause the property to be unquestionably "Indian country" free of taxation and regulation by the state, under the control and jurisdiction of the tribe and the federal government.[13]

Lastly, if *Mescalero* stood for the proposition that lands acquired in trust under 25 U.S.C. 465 and 501 do not merit "Indian country" and "reservation" status, then that aspect of the decision was overruled five years later by *John*, supra at 649, where this Court held that lands held in trust by the United States for an Indian tribe had reservation status.

Finally, petitioner contends that causes arising out of tribal conduct on "Indian country" should not afford immunity from suit or deprive state courts of subject matter jurisdiction because it interferes with its Tenth Amendment rights. Petitioner complains that "Congress has sought to wield its power in a fashion that would

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[13] The United States District Court for the Eastern District of Oklahoma in a related case cited herein at footnote 1 involving this same property found it, on the undisputed facts, to be "Indian country" and that the "federal government has supervision and control over the tribe's activities on the land". Footnote 1 of the court's unpublished decision recited that the bulk of these facts were based on testimony of Governor of the Chickasaw Nation and the Area Director for the Bureau of Indian Affairs. (App. 20, 21, 23 App. to Brief Opposing Pet. for Cert.)

impair the State's ability to function effectively in a federal system", in reference to the application of 18 U.S.C. § 1151 for purposes of civil jurisdiction. Petitioner says § 1151 "has unconstitutionally impaired the sovereignty of this state . . . " This issue is not properly before this Court and should not be considered because it was not raised in the Courts below and Petitioner has not complied with Rule 28.4(b) of this Court requiring that notice be served on the Solicitor General when the constitutionality of an Act of Congress is drawn into question. However, its whole argument on this subject it meritless and fails for a number of reasons, the first of which is that there are other definitions of "Indian country". See *Pelican, McGowan, John,* etc., supra.

Secondly, the Tenth Amendment rights asserted by petitioner pale when tribal autonomy and the unique trust relationship tribes have with the federal government is considered. Accordingly, the Court has consistently declared that the authority of Congress over Indian tribes is plenary. The plenary congressional control over Indians is necessary to fulfill the federal trust responsibility. These principles have been reaffirmed so many times cited authority is not necessary. The Oklahoma Supreme Court has accepted the term "plenary" to mean "full, entire, complete, absolute, perfect and unqualified". *Mashunkashey v. Mashunkashey,* 134 P.2d 976, 979 (Okl. 1942) See also The Federalist No. 42 by Madison, Tudor Publishing Co., (1937) P. 285, 290. And, as this Court said in *Seber* at 718, supra, "the fact that the Acts . . . may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress not the courts".[14]

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[14] Contrary to Petitioners rather overstated concerns on this subject, Respondents submit that state government in Oklahoma is not threatened by its failure to collect taxes from these modest and, often times, financially weak tribal businesses, such as the Chickasaw Motor Inn, which depends on bingo gaming to keep its doors open in the off-season.

Thirdly, Oklahoma's Enabling Act, supra, retained federal control and law making powers regarding the state's Indians and Indian tribes. *Mashunkashey* at 979, *Ex Parte Webb,* 225 U.S. 663, 378 (1912).

C. The Limits Of Tribal Sovereign Immunity From Suit And Subject Matter Jurisdiction Of The Courts Over Indian Tribes Are Subject Only To The Plenary Control Of Congress

Respondents also submit that this Court is not required to decide whether the conduct complained of is off or on "Indian Country" or "reservations" to resolve this dispute. The long established tenet that Indian tribes are immune from suit absent express and unequivocal authorization from Congress has never been qualified. The rule has always been simple, direct and straight forward. Placing any limitations on it would be removing one of the most vital aspects of sovereignty for Indian tribes and the federal trust relationship. It annoys state officials that Indian tribes cannot be treated like private corporations or associations. The state would prefer to have them reduced to mere social clubs over which they could exercise control. The Court discussed Indians and the state-tribal relationship in *United States v. Kagama,* 118 U.S. 375, 384 (1886):

> "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."

This language from *Kagama* is particularly appropriate in this case because Petitioner seeks total and absolute control by the state and its courts over Indian tribes in Oklahoma. The jingoistic tone of Petitioner's brief reveals it's disdain for the Chickasaw Nation when it refers, with apparent relish, to the "dethrone[ing]" of the tribes at page 32 and asserts at page 38 that: "There remains but one sovereign nation within Oklahoma, that being the United States of America", obvious disapproval of the use of the title "nation" by the Chickasaws.

"Although this Court has departed from the rigid demarcation of state and tribal authority laid down in

Worcester v. Georgia," supra, it has not altered the traditional concept of tribal immunity from suit and state court jurisdiction. The line of decisions recognizing this concept appears to begin with *Turner v. United States,* supra at 358 (1919) holding that the Creek Nation could not be sued in any court without tribal consent and authorization from Congress.

Counterclaims are also barred by sovereign immunity where an Indian tribe brings the lawsuit. *United States Fidelity & Guaranty Co.,* supra at 512-513. Congressional waiver will not be implied but must be express and unequivocal. *Santa Clara Pueblo,* supra at 58. *United States v. Testan,* 424 U.S. 392, 399 (1976).

Wold Engineering, supra, presented the unusual situation where the tribe was trying to get into state court. There North Dakota has required that before Indian tribes could have access to the state's court they had to waive sovereign immunity from suits. This Court declared such an arrangement unacceptable. Just O'Conner speaking for the majority, said that this requirement "serves to defeat the tribe's federally conferred immunity from suit" (476 U.S. 890) and that in the "absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states" (at 891). Declaring the North Dakota statute "unduly intrusive on the tribe's common law sovereign immunity" the court concluded that by requiring the tribe to open itself up "to the coercive jurisdiction of the state courts" invited "potentially severe impairment of the authority of the tribal government . . . "

The Court in *Wold* also addressed Petitioner's overstated complaint that "the Tenth Circuit has created in the tribe a sovereign super-entity which can sue and not be sued, make law and be subject to no law, and exercise unknown rights while at the same time ignore the existing rights of others" (Pet. Brief, p.28), where Justice O'Conner said:

> "The perceived inequity of permitting the tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, *much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted."* (at 893) (emphasis supplied)

Even when this Court has held that state tax laws are applicable to Indian tribes it has declined to encroach on the congressional perogative concerning tribal immunity from suit and subject matter jurisdiction. The Ninth Circuit Court of Appeals in *Chamehuevi Indian Tribe v. California State Board of Equalization,* 757 F.2d 1047 (1985) in an action by the tribe for declaratory judgment, held that California's cigarette tax laws could not be imposed on sales to non-Indians by the tribe on the reservation and, following this Court's teachings, further held that California's counter-claim for back taxes was barred by sovereign immunity. This Court granted certiorari and recersed as to the Circuit Court's ruling that the state could not require the tribe to collect the taxes on the state's behalf, 474 U.S. 9 (1985). The lower court's rulings upholding the tribes' immunity from suit were noticeably left intact, a clear indication that this Court will allow the Congress to decide when and to what extent tribal immunity from suit will be limited.

Analogous with the present case is *Puyallup Tribe,* supra, where the Washington state courts had held that their courts had jurisdiction to regulate the fishing activities of the tribe both on and off its reservation. The tribe asserted its immunity from suit declaring that neither it nor the congress had consented. This Court said on vacating the state court's order as to the tribe: "The attack is well founded, absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe. This court, *United States v. United States Fidelity & Guaranty Co.,* supra; . . . and the commentators, see e.g. U.S. Dept. of Interior, Federal Indian Law 491-494 (1958), all concur", Id. at 172-173. It is noteworthy that this Court vacated the state court's

restraining order entirely as it applied to the tribal government regarding both on and off reservation conduct. As a result, tribal immunity from suit remained unqualified and the plenary authority of Congress intact.

The courts of Arizona, which has a large Indian population with tribes very active in commercial activities both on and off their reservations, has said that tribal immunity from suit is not conditioned on whether the cause arises on or off tribal lands, *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 423-424 Ariz. 1968); *S. Unique v. Gila River Pim-Maricopa*, 674 P.2d 1376, 1379 (Ariz. App. 1983); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 507 (Ariz. App. 1985); *Dixon v. Picopa Const. Co.*, 755 P.2d 421 (Ariz. App. 1987).

This Court has declared many times that it is Congress, and not the courts, that has authority over tribal immunity from suit. The Petitioner knows this. However, it comes here, without a single precedent, requesting this Court to encroach upon what the Court has consistently recognized as Congressional perogative. The issue in this case presents a political question to be resolved by Congress. Considering declarations of this Court, the Indian Commerce Clause, treaty obligations and trust responsibility of the government Respondents suggest that this case may present the classic "textually demonstrable constitutional commitment of the issue to a coordinate political department". *Baker v. Carr*, 369 U.S. 186, 217 (1962) depriving the Courts of subject matter jurisdiction. See also *Lonewolf v. Hitchcock*, 187 U.S. 553, 568 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *Price v. State of Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985), Cert. Den. 106 S.Ct. 792 (1985). Perhaps it would be more appropriate for Petitioner to take these matters up with Oklahoma's Congressional delegation.

Both the state and federal district court were without subject matter and in personam jurisdiction.[15] The Circuit

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[15] Oklahoma's statute providing for service of process is 12 Oklahoma Statute § 2004(1)(c)(5) which corresponds with

(Continued on following page)

Court correctly applied the rules in *Lambert Run Coal Co.* and *Minnesota* in dismissing this cause rather than remanding where derivative jurisdiction of the state court was absent.

CONCLUSION

The Respondents respectfully submit that for the aforegoing reasons the decision of the Tenth Circuit Court of Appeals in this case should be affirmed in all respects.

Respectfully submitted,

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(Continued from previous page)

Rule 4(d)(6) Federal Rules of Civil Procedure of the United States District Courts. It permits service of process on those entities "subject to suit". Indian tribes, not being subject to suit causes process to be defective in this case. (The full text is contained in the separate appendix filed by Respondents with the Clerk of the Court.)

No. 88-266

In The

Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION, *PETITIONER*,

v.

JAN GRAHAM, *et al.*, *RESPONDENT*.

REPLY BRIEF FOR THE OKLAHOMA TAX COMMISSION

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REPLY BRIEF FOR THE OKLAHOMA TAX COMMISSION

I. THE TAX COMMISSION'S PETITION IN STATE DISTRICT COURT IS NOT REMOVABLE TO THE FEDERAL COURT.

The Chickasaw Nation's brief on the issue of removal jurisdiction misses the point of concern. The Tribe discusses several issues involving federal law which may emerge in this suit regarding Indian Sovereignty and federal rights belonging to this Tribe. The State admits that this lawsuit will involve the determination of federal questions. But these federal questions are not the basis of the State's cause of action to enforce its tax laws.

When the Federal Court considers the porpriety of removing a case from the State Court system, the consideration is limited to a

scrutiny of the basis of the plaintiff's claim contained in the original pleading. No consideration is given to the defendant's answer or responsive motions which may assert issues of federal law in a defensive argument. Even the complaint itself will not serve as a basis for jurisdiction if it goes beyond a plain statement of the plaintiff's cause of action and replies to a probable defense.

Although the Tribe has discussed many isses of federal law that would serve to sustain federal jurisidiction had they brought suit against the State, that is not the case which presents itself here because the Tribe did not bring this action. This lawsuit was brought by the State asserting claims arising from state laws alone. The State's claims may involve questions of federal law. However, not every question of federal law emergining in a suit is proof that a federal law is the basis of the suit.

In *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936) at 116, this Court illustrated how the federal question must be the basis of the plaintiff's claim rather than an issue that may be involved in the defense of the claim by the following example:

> The argument for the respondent proceeds on the assumption that, because permission at times is preliminary to action, the two are to be classed as one. but the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail. Let us suppose an amendment of the Constitution by which the States are left at liberty to levy taxes on the income derived from federal securities, or to lay imposts and duties at their pleasure upon imports and exports. If such an amendment were adopted, a suit to recover taxes or duties imposed by the state law would not be one arising under the Constitution of the United States, though in the absence of the amendment the duty or the tax would fail. We recur to the test announced in Puerto Rico v. Russell & Co., supra: "The federal nature of the right to be established is decisive - not the source of the authority to establish it." Here the right to be established is one created by the state.

In the case at bar, the tax here in controversy is imposed under the authority of a statute of Oklahoma. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. Therefore, the only forum available to the State in actions to enforce state tax laws are the State District Courts.

The remainder of the Tribe's argument on removal jurisdiction proposes that the well-plead complaint rule is inapplicable to this case because this cause of action is completely pre-empted by federal law. This argument is unpersuasive because the Oklahoma Tax Commission has been operating for years under the knowledge that the Federal Government has not pre-empted Oklahoma's revenue laws and to be informed of the contrary would be quite a revelation. Be that as it may, the Tribe asserts federal jurisidiction by way of a federal question, rather then diversity of citizenship. In *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987), this Court flatly stated that "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists *only* when a federal question is presented on the face of the plaintiff's properly pleaded complaint."

There does exist an independent corollary to the well-pleaded complaint rule known as the "complete pre-emption" doctrine, wherein the Court concludes that the pre-emptive force of a statute is so extraordinary that it completely occupies the field to the exclusion of state law to the end that a state law claim within the field would present a federal question. The Tribe contends that a suit against an Indian tribe is such a claim because the field of "Indian law" is completely pre-empted by federal law. The answer to this contention is found in this Court's opinion in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) at 147 which holds:

> At the outset, we reject - as did the state court - the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land.

The fields of Indian law and state taxation are not completely pre-empted by federal law and therefore the State's claim does not present a federal question. The Tribe's federal pre-emption or immunity defense must be heard in State Court. The Tribe asserts that this conclusion would foreclose its access to the federal forum. But this concern is infounded because the Tribe may bring any federal claims they have in an action in federal court. however, the Tribe did not bring this action; the State did, and the State has no federal claims.

II. TRIBAL SOVEREIGN IMMUNITY IS NOT A DEFENSE TO THE STATE'S CLAIM

The Tribe ties its sovereign immunity theory to the proposition in its brief that "the Chickasaw Reservation in Oklahoma has not been disestablished by Congress." The Tribe raises this argument in order to claim the immunities which may arise from that status. Of course, the State argues the reverse because tribal activities not on any reservation are subject to state law applicable to all citizens of the State, *Mescalero*, supra. This issue is necessarily at the core of the Tribe's immunity defense because a Tribe in its capacity as a Tribe has no inherent immunity in relation to the State. A tribe is immune from state jurisdiction only by virtue of activity within a federal land area or reservation, set aside by the Federal Government for the use of the tribe, because of the Federal Government's maintenance of jurisdiction upon federal land. This Court has therefore held in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) that "the question has always been whether the state's action infringed on the right of *reservation Indians* to make their own laws and be ruled by them" (the Court's emphasis at 411 U.S. 181). The Tribe has no immunity standing alone, vis-a-vis the State, rather, this issue involves the allocation of power between the State and the Federal Government.

If the land in question is a federal Indian reservation, then, under the aegis of the central government's jurisdiction, the federal policy provides that the Indian Tribes should be free to exercise their

rights to govern themselves, more or less independent of state laws. But the fact that this land is not part of a federal reservation removes the cloak of immunity associated with that status from the tribal activity. The State's brief contains a litany of substantial and compelling evidence of congressional intent to dispose of the Chickasaw Reservation in Oklahoma, not the least of which were the reports submitted to Congress by the Dawes Commission which leave no doubt as to what Congress meant to accomplish. The Tribe argues that no matter what the congressional reports say, there is no statute which explicity states that the Chickasaw reservation is hereby disestablished and State jurisdiction shall henceforth obtain. Although such clear cut legislation would go a long way toward eliminating litigation, this Court has realized that when Congress began its program of opening up the Indian reservations for settlement at the turn of the century, Congress did not concern itself with such meticulous language because at the time the prevailing wisdom was that the reservation system would cease to exist and therefore such careful drafting seemed unnecessary.

For this reason, this Court has ruled in *Solem v. Bartlett*, 465 U.S. 463 (1984), that explicit language of cession and compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land act - particularly the manner in which the transaction was negotiated with the Tribes involved and the tenor of legislative reports presented to Congress - unequivocally reveal a widely-held, contemporaneous understanding that the reservation would be disestablished, the Supreme Court will infer that to be Congress' intent notwithstanding unclear statutory language. Also, the Court will consider factors such as events occurring after the passage of a surplus land act, the manner in which the Bureau of Indian Affairs dealt with the opened land, and Congress' own treatment of the affected area, as well as recognizing who actually moved onto opened reservations as relevant to deciding whether the area has lost its Indian character through diminishment. In this case, the authorities cited in the State's brief specifically relate Congress' intent to dispose of this reservation. Also, the Bureau of Indian Affairs describes it as the

"former Chickasaw reservation" indicating its discontinued existence, see *Indian Lands and Related Facilities as of 1971*, map, Bureau of Indian Affairs, U.S. Geological Survey, U.S. Dept. of Interior.

The Tribe asserts that the intentions of Congress to dispose of the Chickasaw reservation under the Curtis Act (30 Stat. 495) were set aside by the passage of the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 et seq.. But the State's brief cited Senate Report 1232, 74th Congress, 1st Sess., July 29, 1935, which accompanied the OIWA and clearly demonsrates that Congress recognized that no reservations survived past statehood. The Tribe attempts to impeach the State's citation to the authority of Report 1232 by contending that this report accompanied an earlier version of the OIWA which was not enacted. That statement is incorrect. The Tribe cited H. Rep. No. 2408, 74th Cong. 2nd sess. (1936) as the report which accompanied the OIWA, which is correct because on the face of the report is clearly printed the words "To accompany S. 2047". That notation was also made on the face of report 1232 which means that both reports accomapnied this bill in Congress. Bill S. 2047 was enacted as the Oklahoma Indian Welfare Act. Both of these reports did in fact accompany the OIWA in Congress and both reports express the intent of Congress with regard to that legislation (Report 2408 references Report 1232 at page 4).

Report 2408 does add to the understanding of legislative intent within the OIWA and is an important citation. It should be noted first of all that, contrary to what might be implied in the Tribe's brief, there is nothing in Report 2408 that contradicts the language in Report 1232 and the reports are to be read together as the legisaltive history of the OIWA. In any event, the language in Report 2408 that was emphasized by the Tribe in its brief is of great significance. The report states:

> . . . These sections will permit the Indians of Oklahoma to excercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934.

This statement illustrates what the State has been trying to explain all along. The State of Oklahoma has been given separate and special treatment which is different than that given any of the other forty-nine states. The fact that Oklahoma Indians were dealt with in a separate act demonstrates that the Indian situation is unique in Oklahoma and unlike any other state. But Congress has not created an immunity here by affirmative action and the immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication, *Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949) at 365*. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), this Court recognized in note 5 at page 603 that some progess has been made in the restoration of tribal government under the OIWA, however, the Court still found that the underlying principles on which the reservation cases are based do not fit the situation of the Oklahoma Indians because of the lack of tribal autonomy of the Oklahoma tribes.

More recently, this Court cited these two cases dealing with Oklahoma for authority in the opinion in *Mescalero Apache Tribe v. Jones* which rules that the Indian Reorganzation Act provides no immunity from state law. The Court ruled at 411 U.S. 157:

> Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by §§476 and 477 of the Act. These provisions were designed to encourage tribal enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732. In this context we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in §465 does not encompass or bar the collection of New Mexico's nondiscriminatory Gross Receipts Tax and that the Tribe's ski resort is subject to the tax.

Since Report 2408 expresses Congress' intent that the OIWA should permit Indians of Oklahoma to exercise the same

rights as those granted to Indians outside of Oklahoma by the IRA, this Court should conclude that tribal enterprises in Oklahoma who use these provisions to enter the business community on a footing of equal competition should also abide by the law and pay their taxes. The *Mescalero* decision illustrates that these rights carry with them the burden of taxation that is equally carried by all the competitors in the economic marketplace. Contrary to the Tribe's position that the IRA or the OIWA bestows upon Indian tribes freedom from state laws, this Court ruled at 411 U.S. 152 that:

> The Reorganization Act did not strip Indian tribes and their reservation lands of their historic immunity from state and local control. But in the context of the Reorganization Act, we think it unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of the Government." (Citations omitted). On the contrary, the aim was to disentagle the tribes from the official bureaucracy. The Court's decision in *Organized Village of Kake [v. Egan, 369 U.S. 60 (1962)]*, which involved tribes organized under the Reorganization Act, demonstrates that off-reservation activities are within the reach of state law.

The Tribe attempts to distinguish this case from *Mescalero* by contending that their business is not operated off of a reservation since the business is located within the boundaries of the Tribe's "original reservation." The State would submit that this distinction is merely a play on words by the Tribe. If the Tribe actually inhabited a reservation, it would be appropriate to refer to it as the "Chickasaw Reservation" without a need to qualify it as the "original" reservation. The Bureau of Indian Affairs more accurately describes the status of the land in question as the "former reservation" which is really a non-status that characteristics this area of Oklahoma as not any kind of reservation or as a non-reservation area. This status is identical to the land status found in the Mescalero case and therefore, *Mescalero* is controlling.

The Tribe cites various cases involving reservations in support of its theory that the trust status of their land meets the test of

"Indian country status" as its land is tribually owned land devoted to Indian occupancy and validly set apart for the use of Indians, page 36 of respondent's brief. however, the cases cited by respondent, to-wit: *United States v. Pelican*, 232 U.S. 442, *United States v. McGowan*, 302 U.S. 535, and *United States v. John*, 437 U.S. 634, each involved land purchased by the United States for a tribal community or land within a recognized Indian reservation and proclaimed as such upon which was located a resident tribal population. The case at bar is distiguishable from that situation because the Chickasaw Nation purchased this motel on their own account for use as a business property, not as a place for tribal members to live. The United States government did not purchase this property for the Tribe or set it aside for the Tribe's use but only accepted the property in trust on behalf of the Tribe. As this Court has ruled in *Mescalero*, the transfer in trust does not cloak the enterprise with immunity. Due to this distinction, the State would disagree with the Tribe that *Mescalero* was overruled by *John*.

As for the Tribe's objections to the constitutional arguments raised in the State's opening brief, the State must first point out that it was never the State's position that Section 1151 should be invalidated as violative of the Constitution. As applied to federal reservations, Section 1151 operates validly within the powers of the federal government. However, the State insists that the lower courts incorrectly applied the statute to pre-empt state law from applying to the Tribe's off-reservation business. The lower court's application of the statute in its order, rather than the statute itself, is an unconsitutional infringement upon the State's rights. The State does not ask for a declaration from this Court that Section 1151 is unconstitutional, the State asks that the lower decision be reversed.

Finally, the Tribe argues that its theory of absolute sovereign immunity has been upheld by this Court in several opinions cited in the Tribes brief. The Tribe's authority is distinguishable from the situation which is presented in this case. For example, the Tribe cites the case of *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940) for this

proposition. In *U.S. Fidelity*, the case involved the litigation of contracts entered by the United States in its own name on behalf of the Indian Tribes. Since the Federal Governments interest was being litigated and the United States was suing in its own name to protect that interest, the immunity of the United States attached to the Tribal beneficiary because this Court would not allow the private party defendant to circumvent the immunity of the Federal Government by counterclaiming the tribe in order to defeat the governments interest.

In the case at bar, the United States is not a party and no federal rights are involved or are being infringed. Also, the Federal Government takes no responsibility for the actions of the Tribe or the operation of the tribal business. Other than holding the legal title to the land in trust for the Tribe, the United States has no interest in the tribal business and has no duty to manage the affairs of the enterprise, which is strictly a tribal concern. Since the legal title to the land is not challenged the interests of the United States are not implicated in this lawsuit. Furthermore, the State is not a private litigant but a sovereign entity in its own right as it is an integral part of the federal system. Although the Tribe is subordinate to only the Federal Government, not the States, likewise, the States are subordinate to only the Federal Government and not the Tribe. Therefore, the Tribe standing ALONE cannot assert sovereign immunity over the State's lawsuit, especially in view of the fact that the sovereignty of the Tribe is of limited and dependent character. The Tribe's citations to cases involving private litigants and reservation tribes in other States presents circumstances so far removed from this action involving the State's rights to collect validly imposed taxes, that those cases provide no authority upon which its claimed immunity can rest.

Also, the Tribes citation to *Chemehuevi Indian Tribe v. California*, 757 F.2d 1047 (9th Cir. 1985) is unavailing because that decision was reversed by this Court in a *per curiam* decision at 474 U.S. 9. On remand to the Ninth Circuit, that Court held in *Chemehuevi Indian Tribe v. California*, 800 F. 2d 1446 (9th Cir. 1986) at 1448 that the doctrines of federal pre-emption and tribal self-

government are "independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." If the state action is not pre-empted by federal legislation or treaty, the state need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217 (1959) that state action must not infringe on the rights of reservation Indians to govern themselves. This principle of tribal self-government seeks an accomodation between the interests of the Tribe and the Federal Government, on the one hand, and those of the State, on the other, *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). The State disagrees that the Tribe's sovereign immunity theory is upheld in the context of the *Chemehuevi* decisions, especially in light of the fact that there is no reservation involved in this case.

The right to do business in the State of Oklahoma carries with it the burden of collecting the State's taxes, and the business is responsible for making the State whole if it breaches that duty. Equality of privilege and equality of obligation should be inseparable associates, *Oklahoma Tax Commission v. United States*, supra. The vendor liability provisions of the State's sales and cigarette tax laws only operate against the Tribe if its fails to properly collect, report and remit the taxes in violation of State law and the Federal case law on point. The Tribe's contention that it cannot be held liable for such violation due to its status as a Tribe would render this Court's decision in *Mescalero* and *Colville* nugatory.

Under those decisions it is settled law that the Tribe is required to collect the States taxes. But if the State is prevented from assessing the Tribe for delinquent taxes, or from suing the Tribe to enjoin the operation of its business in Oklahoma until the taxes are paid, then there is no effective enforcement mechansim available to the State to collect its taxes. This lawsuit is evidence itself that the Tribe will not collect the taxes as prescribed in the *Mescalero* and *Colville* decisions on its own volition. In order that the decisoions of this Court be effective as law rather than policy, this Court should require the Tribe to answer the State's complaint.

CONCLUSION

This Tribe has entered the economic marketplace of the State in direct competition with other businesses. The cost of doing business includes the liability for taxes or damage that the business causes because business has always been required to pay its own way. The Tribe may avoid this burden by not operating a business, but if the tribal activity reaches out to the general community and invites the public into its business place, it must be responsible to the community for the liability that it accrues.

For these reasons the Oklahoma Tax Commission respectfully requests that this Court reverse the decision of the Tenth Circuit Court of Appeals and hold that the States action was improperly removed to federal court and the Tribes sovereign immunity theory is not a defense to the States action.

Respectfully submitted,

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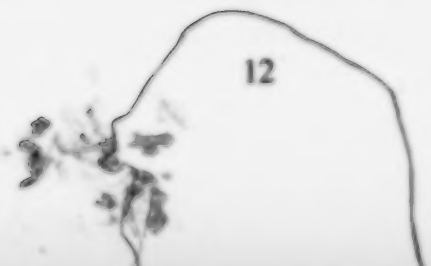

No. 88-266 (5)

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OKLAHOMA TAX COMMISSION,
Petitioner,
v.
JAN GRAHAM, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICI CURIAE* SENECA NATION OF INDIANS AND THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Seneca Nation of Indians are large and important federally recognized Indian tribes. The Fort Peck Reservation is located in Montana. The Seneca Nation's three Reservations are located in New York.

The Tribes have an interest in this case because under existing law states have no authority to subject Indian tribes to coercive state court jurisdiction. Both the As-

siniboine and Sioux Tribes and the Seneca Nation desire to be protected from coercive state court jurisdiction in the event suit is brought against them or their economic enterprises.

Both Tribes are involved in economic activity where revenue is generated to fund needed governmental services. For example, the Assiniboine and Sioux Tribes own and operate a federal defense plant, one of the largest industrial employers in Montana. The Seneca Nation owns and operates several enterprises, which include service stations, a campground and gaming establishments.

Amici Tribes file this brief to urge this Court to uphold the Court's earlier decisions that, in the Tribes' view, have held that states have no legislative power to tax tribes or Indians on Indian trust lands, and state courts have no subject matter jurisdiction to enforce state laws, absent specific congressional authority. Any authority states do have in these circumstances is thus conferred by federal law.

All parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

Removal should be sustained because federal law has completely displaced state law where a state seeks to exercise authority over Indian tribes on Indian trust lands. This case therefore is one where the well-pleaded complaint rule does not operate because of complete federal preemption. *Caterpillar Inc. v. Williams*, 482 U.S. ——, 96 L.Ed.2d 318, 327-328 (1987); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

This complete preemption dates from the earliest days of the Republic with the exclusive power vested in Congress over relations with Indian tribes contained in the Constitution. Complete preemption is continued by nine-

teenth century cases, *E.g., Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), by the Oklahoma Enabling Act, and by modern decisions of this Court. *E.g., Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985).

Complete preemption is especially clear in the "special area" of Indian taxation. Decisions of this Court establish that states have no legislative power to tax tribes or Indians on Indian trust lands, and state courts have no subject matter jurisdiction to enforce state taxes, except where Congress has specifically conferred that legislative and judicial authority on a state. *California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L.Ed.2d 244 (1987); *Blackfeet Tribe, supra.* A state's assertion of the power to tax an Indian tribe on tribal trust lands must necessarily derive, therefore, from federal law, not from some inherent power of the state. For this reason, the present suit, or any suit by a state asserting taxing authority over a tribe on tribal trust land, "arises under federal law" and is removable to federal court. *Oneida, supra.*

Since, moreover, the state court lacks subject matter jurisdiction, *e.g., Williams v. Lee*, 358 U.S. 217 (1959), and at the time the case was removed federal courts had only derivative jurisdiction over removed cases, the case was properly dismissed. For that reason, rather than on grounds of tribal sovereign immunity, this Court should accordingly affirm the judgment of the court of appeals.

ARGUMENT

The State brought this action in state court to collect state taxes from a business enterprise owned and operated by a federally recognized Indian Tribe located on lands held in trust for the Tribe by the United States. The case was removed by the Tribe to federal court. *Amici* Tribes submit that removal was proper, but on different grounds from those determined by the lower courts.

I. The State's claim arises under federal law.

A. Controlling principles on removal jurisdiction.

As this Court held in *Caterpillar Inc. v. Williams*, 482 U.S. ——, 96 L.Ed.2d 318, 327 (1987) (footnote omitted):

> Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant . . . . The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Where preemption arises only by assertion of a federal constitutional or statutory provision as a defense to a claim based entirely on state law, removal is improper (*ibid*)

> even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983).

On the other hand, this Court has created an exception to the well-pleaded complaint rule, holding in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. ——, 95 L.Ed.2d 55, 63 (1987) (emphasis added) that:

> . . . Congress may so *completely pre-empt* a particular area, that any civil complaint raising this select group of claims is necessarily federal in character.

Accord, Caterpillar, 482 U.S. at ——, 96 L.Ed.2d at 327-328. In areas completely preempted by federal law "any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at ——, 96 L.Ed.2d at 328. Thus, in areas "completely preempted" by federal law, all claims arise under federal law, even if only state law claims appear on the face of the complaint. The theory is that in these subject areas, federal substantive law has completely displaced state law principles.

The first case to find such complete preemption was *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968). The petitioner there filed suit in state court against a union, seeking to enforce a collective bargaining contract. The "petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). Nevertheless, the Court in *Avco* held the claim to be completely preempted by Section 301 of the Labor Management Relations Act (LMRA)—which specifically provides a federal cause of action for matters relating to collective bargaining agreements.[1] As recently characterized by the Court, *Avco* held that the complaint arose under federal law because

> [t]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.

Franchise Tax Board, 463 U.S. at 23.

Similarly, in *Metropolitan Life, supra*, an employee filed suit in state court alleging contract and tort claims

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[1] 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

arising out of denial of disability benefits. The court of appeals found that the "complaint stated only state causes of action," and that issues involving the federal Employee Retirement Income Security Act (ERISA) arose only by way of defense. 481 U.S. at ——, 95 L.Ed.2d at 62. This Court reversed, finding the employee's claims to be completely preempted by ERISA. The Court noted that the jurisdictional provision of ERISA [2] "closely parallels that of § 301 of the LMRA." *Id.* at 64. Moreover, the legislative history of the ERISA civil enforcement provision clearly stated that claims within its scope were intended to arise under federal law, in a manner like claims brought under Section 301 of the LMRA. Thus, although the suit "purports to raise only state law claims, [it] is necessarily federal in character by virtue of the clearly manifested intent of Congress." *Id.* at 65.

This complete preemption exception to the well-pleaded complaint rule is not without careful limitations. It applies only with respect to causes of action which are central to the preemptive federal scheme.[3] *E.g.*, *Caterpillar*,

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[2] Section 502(f) of ERISA, 29 U.S.C. § 1132(f), provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided in subsection (a) of this section in any action .

[3] In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), the state brought an action in state court to collect unpaid state income taxes against an ERISA covered benefit plan. This Court held that the claims did not arise under ERISA—which was concerned with employee benefits, not state tax collection:

> Unlike the contract rights at issue in *Avco*, the State's right to enforce its tax levies is not of central concern to the federal statute [ERISA].

Franchise Tax Board, 463 U.S. at 25-26.

The Court noted that since the ERISA statutory scheme creates express federal causes of actions for particular classes of persons—

482 U.S. at ——, 96 L.Ed.2d at 327-328. In *Caterpillar* the plaintiff alleged breach of individual employment contracts by management and salaried employees who were not covered by a collective bargaining agreement. This Court held that this action was *not* completely preempted by § 301 of the Labor Management Relations Act, stating:

> Section 301 says nothing about the content or validity of individual employment contracts.
>
> • • • •
>
> [R]espondents' complaint is not substantially dependent upon interpretation of the collective bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement.

Caterpillar, 482 U.S. at ——, 96 L.Ed.2d at 328-329.

Thus, *Caterpillar* reinforces the proposition that a cause of action must fall directly within the comprehensive federal scheme for the complete preemption doctrine to apply.

Read together, these cases suggest that "complete preemption" will be found where a complaint, fairly read, raises a cause of action which is central to a comprehensive scheme of federal law intended to displace state law. The cause of action must go to the heart of the federal concern, and not be merely tangentially related.[4]

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beneficiaries, participants, fiduciaries and the Secretary of Labor—the Court would not expand the Act by providing that actions by others were completely preempted. Likewise, ERISA expressly preserves certain state law causes of action—concerning regulation of insurance, banking, or securities. *Id.* at 25. These statutory provisions buttressed the Court's conclusion that an action by a state to collect state taxes does not arise under federal law as a result of complete preemption by ERISA.

[4] Further, where federal substantive law is comprehensive, but Congress has specifically limited the availability of federal remedies, the Court has refused to expand the availability of a federal forum

B. Decisions of this Court establish that, from the beginning of the Republic, federal law has completely displaced state power over Indian tribes on Indian trust lands.

As discussed in Section I.A., *supra*, the most recent cases dealing with the "complete preemption" exception concerned the effect of the LMRA and ERISA. Those decisions cite a leading Indian law case, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*See Caterpillar*, 96 L.Ed.2d at 328, n.8 and *Franchise Tax Board*, 463 U.S. at 23, n.25) as another example of this exception.

Oneida was an ejectment action brought by a tribe in federal court asserting its federally protected Indian title. The court of appeals had ruled that the Tribe's possessory claim did not present a federal question under the well-pleaded complaint rule. This Court reversed, recognizing that both the source and continued protection of Indian title were matters of federal law. *Oneida*, 414 U.S. at 670 (the "federal law, treaties, and statutes protected Indian occupancy" [and] "termination [of tribal title] was exclusively the province of federal law").[5] As Justice Rehnquist stated: "the Federal Government has shown a continuing solicitude for the rights of Indians in their land . . . . Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee." *Id.* at 684 (Rehnquist, J. concurring) (emphasis in original).

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by finding complete preemption. *E.g., Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986).

[5] The Court relied on the fundamental principle of federal Indian law, expressed by Chief Justice Marshall, that relations with the Indian tribes, "according to the settled principles of our constitution, are committed exclusively to the government of the Union." *Oneida*, 414 U.S. at 671, quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

As in *Oneida*, in this case the State asserts a right to tax "conferred by federal law, wholly independent of state law." For the State can have no authority to tax tribal activities on tribal trust lands *unless* that authority has been conferred by federal law. This is because, as this Court has repeatedly held, state taxation of tribes and Indians on Indian trust lands is the *exclusive* province of federal law:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), *citing Worcester v. Georgia*, 6 Pet. 515, 561 (1832). As a corollary of this authority, . . . Indian tribes and individuals generally are exempt from state taxation within their own territory.

Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985).

See also Oneida, 414 U.S. at 667 ("Once the United States was organized, and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of federal law").

In the early case of *United States v. Forty Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876), this Court contrasted the power of Congress and the states over Indians under the Articles of Confederation and under the Constitution. It observed that in the Articles: ". . . two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." *Id.* at 195. The Court concluded that:

> [O]f necessity, these limitations rendered the power of no practical value. This was seen by the Convention which framed the Constitution; . . . The only efficient way of dealing with the Indian Tribes was to place them under the protection of the General Government. Their peculiar habits and character required this; . . . .

Thus, state control over Indian commerce under the Articles was replaced by the Constitution which "provid[ed] that intercourse and trade with the Indians should be carried on *solely* under the authority of the United States" (emphasis supplied).[6]

The continued exclusive control of Congress over Indians on Indian lands was expressly preserved in the Oklahoma Enabling Act, Section 1 of which reads:

> [N]othing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."[7]

As this Court held in *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911): "[i]n passing the enabling act for the admission of the state of Oklahoma . . . Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act." *See also McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 175-176 (1973).

"Complete preemption" as an exception to the well-pleaded complaint rule is thus even stronger in the Indian area than under LMRA and ERISA. State courts have concurrent subject matter jurisdiction over cases concerning the LMRA and ERISA, although they must apply federal law, *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. ——, 95 L.Ed.2d 791, 799 (1987);

[6] *See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-559 (1832).

[7] Act of June 16, 1906, ch. 3335, 34 Stat. at 267-68.

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-508 (1962). This subject matter jurisdiction derives from state common law, and predates the congressional statutes involved.[8] But in the Indian area, as this Court explained in *Three Affiliated Tribes v. Wold Engineering Co.*, 476 U.S. 877, 879 (1986), "[h]istorically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of the state governments." States have never had authority to impose their taxes on Indians on Indian trust lands, and state courts entirely lack subject matter jurisdiction to enforce such taxes. See pp. 16-17, *infra*. This authority can *only* be conferred upon states by Congress, and if it is conferred, the authority arises under federal law, not state law. In this case, therefore, as in *Oneida*, the rights asserted by the state "do not depend on . . . any . . . statutes of the State, but upon" federal law. *Oneida*, 414 U.S. at 672.

The preemptive authority of federal law is especially clear in the area of state taxation of Indians on Indian lands. Decisions of this Court stretching back to just after the Civil War firmly establish that states have no jurisdiction to tax Indians on Indian lands. In *Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-756 (1867), this Court held that lands allotted by treaty to individual Shawnee Indians remained "under the control of Congress," and that since under the Constitution "there can be no divided authority . . . they enjoy the privilege of

[8] This case also presents more complete federal preemption than *Mesa v. California*, 813 F.2d 960 (9th Cir. 1987), *petition for cert. granted* No. 87-1206. In *Mesa*, federal postal employees removed state traffic prosecutions that present no question of federal law, either in the indictments or in the issues raised in defense. In *Mesa*, the state laws that were violated had no connection with federal law or authority.

The Constitution does not provide for exclusive federal jurisdiction over cases involving federal employees. State power to prosecute federal employees for traffic offenses, unlike the power to tax tribes on tribal lands, does not derive from a delegation of power by Congress. It arises under state, instead of federal, law.

total immunity from state taxation." In *New York Indians*, 72 U.S. (5 Wall.) 761, 770-771 (1867), this Court held that a state tax on Indian lands would be an "unwarrantable interference" with the Indians' "undisturbed enjoyment of" their lands as guaranteed by federal law. *Accord, Blackfeet Tribe*, 471 U.S. at 764-765; *McClanahan v. Arizona Tax Comm.*, 411 U.S. at 168-169.

As this Court stated in *Blackfeet Tribe*, 471 U.S. at 765, "this Court has never wavered from the views expressed in these cases." Indeed, in the "special area of state taxation of Indian tribes and tribal members" on Indian trust land, this Court has even "adopted a *per se* rule" to the effect that the pre-emptive power of federal law automatically invalidates state taxation of Indians on Indian trust lands absent express congressional authorization, *California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L.Ed.2d 244, 258 n.17 (1987) (emphasis added). *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) ("... *in the special area of state* taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or income from activities carried on within the boundaries of the Reservation ...").[9] While a balancing of federal, tribal and state interests is generally required with respect to most other Indian jurisdictional matters, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 (1980), this Court has found the tribal and federal interests inherent in tribal tax immunities to so far out-

[9] As this Court has stated:

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted *only* when Congress has made its intention to do so unmistakably clear.

Blackfeet Tribe, 471 U.S. at 765 (emphasis added).

weigh any possible state interests that federal law always controls.

> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.

Cabazon, 480 U.S. ——, 94 L.Ed.2d at 258 n.17.

The teaching of these cases for present purposes is that from the adoption of the Constitution, states have had no inherent power to tax Indian tribes on Indian trust lands. Congress can confer that power on states, and when it exercises power delegated by Congress, a state does so as a matter of federal law. *E.g., Parker v. Richard*, 250 U.S. 235, 239 (1919) (Congress has the constitutional power to delegate authority to Oklahoma state courts to administer estates of allottees of the Five Tribes, and a state court exercising that authority conferred by Congress "acts as a Federal agency"). As this Court recently reiterated in *National Farmers Union v. Crow Tribe*, 471 U.S. 845, 852 (1985), in "all" cases involving tribal immunity from state taxation "the governing rule of decision has been provided by Federal law."

As in *Oneida, id.* at 675-676, *Gully v. First National Bank*, 299 U.S. 109 (1936), is distinguishable because any cause of action in favor of the state arises under federal, not state, law. In *Gully*, the state tax collector sued a national bank for taxes owed by a corporation it had acquired. In the acquisition agreement, the national bank had promised to pay all debts and liabilities of the acquired company. As this Court explained in *Oneida*, *Gully* was a "suit ... on a contract having its genesis in state law, and the tax that the defendant had promised

to pay was imposed by a state statute. The possibility that a federal statute might bar its collection was insufficient to make the case one arising under the laws of the United States." *Id.*, 414 U.S. at 675-676. Here, unlike *Gully*,[10] the underlying cause of action—if it exists at all—is wholly independent of state law. The question is whether Congress has created this cause of action by an act conferring authority on the state to tax and subject matter jurisdiction on state courts to enforce that tax. Even if Congress has done this, the cause of action arises under federal law.

To be sure, as in *Gully*, the State here relies on its own taxing statutes. But unlike *Gully*, there is no common law state court contract claim,[11] and those statutes can have no force over the tribe on tribal trust lands as a matter of state law. The State can have the taxing authority it claims *only if* Congress has conferred it upon the State. Federal, not state, law sets the scope of any state rights to tax the tribe here, "wholly apart from the application of state law principles." *Oneida*, 414 U.S. at 677.

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[10] In addition, *Gully* was decided more than 30 years before the Court first articulated the complete preemption doctrine in *Avco*, 376 F.2d 337, 339-340 (6th Cir. 1967), *affirmed*, 390 U.S. 557 (1968). The complete preemption doctrine provides an *exception* to the well-pleaded complaint rule. Thus, where there is complete preemption, a complaint arises under federal law even though it alleges only violations of state law. *Avco*, 390 U.S. at 554-560. Literal application of *Gully* would negate all this Court's jurisprudence on complete preemption. Properly understood, *Gully* stands for the proposition that, in the absence of complete preemption, a federal question must appear on the face of the complaint for the case to "arise under" federal law. It does not, as petitioners argue here, foreclose application of this Court's complete preemption principles.

[11] There might be such a claim if the Tribe had entered into a tax enforcement agreement with the State, as many tribes have done, providing for the Tribe to impose and collect certain taxes similar to those of the State, and the State were suing to enforce that agreement.

The State seeks to avoid these principles by arguing that the Chickasaw Nation's reservation and tribal authority was disestablished, and therefore that the State is lawfully entitled to tax tribal activities because they are outside any reservation (Br. pp. 12-29).[12] It also argues that state law is applicable within Indian county in Oklahoma (Br. pp. 29-37).

Amici Tribes submit that the State is wrong on the merits of these contentions. For present purposes, however, the arguments avail the State nothing. For it is beyond question that *if* Congress has conferred authority on Oklahoma to tax these tribal activities—whether by disestablishing the Nation's reservation or government or by making state law applicable within Indian country in Oklahoma or in some other fashion—that authority derives from federal and not state law. *See e.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585-586 (1977). The Chickasaw Nation is concededly still under the continu-

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[12] The State relies on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The lands in *Mescalero* had never been part of that Tribe's reservation, were not held in trust for it, and were simply leased to the Tribe for 30 years. *Id.* at 146. By contrast, the lands in this suit were part of the Chickasaw Nation's historical reservation and are today held in trust for the Tribe by the United States.

Amici Tribes submit that the present record is insufficient for this Court to determine the disestablishment question, and greatly doubt that the Reservation was disestablished when the Atoka Agreement was ratified by Congress. That Agreement provided for allotment of most tribal lands and agreed to opening of other lands to homesteaders. These kinds of statutes have sometimes been construed to disestablish reservations, *E.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and sometimes not to do so, *E.g.*, *Solem v. Bartlett*, 465 U.S. 463 (1984). Even if the Reservation were disestablished, the Chickasaw Nation's tribal government was clearly continued by the Act of April 26, 1906, ch. 1876, 34 Stat. 137, and exists today, and the tribal trust lands on which the motel is located are unquestionably Indian country under 18 U.S.C. § 1151. *United States v. John*, 437 U.S. 634, 648-653 (1978); *See United States v. McGowan*, 302 U.S. 535 (1938).

ing protection of federal law. Thus, any claim by the State to tax the Tribe's activities on its lands is one arising under federal law, and hence removable to federal court.

II. The case below was properly dismissed, because the state court had no subject matter jurisdiction.

Since the case was properly removed, this Court should review its dismissal by the courts below. *Amici* believe dismissal was proper, although not on the ground determined by the court of appeals.

Much of the State's brief, as well as the opinion below, concerns the issue of whether a suit against a tribe necessarily entails a federal question as a result of the Tribe's immunity from suit. The argument focuses on whether in the context of this case, tribal sovereign immunity is a jurisdictional barrier, inherent in the petitioner's complaint, or whether it is more properly characterized as a defense. The court of appeals focused its analysis on this question.

Amici Tribes submit that this Court need not reach that issue, because this case was properly dismissed, albeit on the narrower ground that the state court lacked subject matter jurisdiction over a claim against an Indian tribal defendant on Indian trust lands. Thus, the federal court acquired no jurisdiction on removal.[13]

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[13] At the time this action was filed, 28 U.S.C. § 1441 required federal court dismissal of a removed action as to which the state court lacked jurisdiction. *See* Wright, Miller & Cooper, Federal Practice and Procedure § 3721, p. 196. As this Court stated in *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382 (1922):

> If the state court lacks jurisdiction. . . . the Federal court acquires none [on removal], although it might in a like suit originally brought there, have had jurisdiction. (Citations omitted.)

[Continued]

This Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959), clearly establishes that the exercise of coercive state court jurisdiction over an involuntary Indian defendant "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them," unless Congress has authorized that jurisdiction. *Id.* at 220. A number of cases subsequent to *Williams* confirm the absence of state court subject matter jurisdiction over Indian defendants on Indian lands. *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 148-149 (1984) (state court jurisdiction "over claims by Indians against non-Indians" implicates very different interests and does not impede tribal self-government); *Bryan v. Itasca County*, 426 U.S. 373, 383-384 (1976) (Public Law 280 construed to confer subject matter jurisdiction on state courts to resolve private legal disputes, not upon states to tax); *Fisher v. District Court*, 424 U.S. 382 (1976); *Kennerly v. District Court*, 400 U.S. 423 (1971) (only Congress can confer jurisdiction on state courts over reservation Indian defendants).[14]

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[13] [Continued]

On June 19, 1986, Congress amended 28 U.S.C. § 1441, reversing the "derivative jurisdiction" rule of *Lambert Coal Co.* by adding a new section 28 U.S.C. § 1441(e) as follows:

> The court to which such civil action is removed is *not* precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Judicial Improvements Act of 1985, Public Law No. 99-336, § 3, 100 Stat. 633, 637 (1986). The amendment applies only to actions filed in state court after the date of enactment. Wright, Miller & Cooper, Federal Practice and Procedure § 3271 (1988 pocket part), p. 10.

[14] If the Court is nevertheless inclined to examine the sovereign immunity issue, *Amici* Tribes offer the following framework.

This Court has long recognized tribes as possessing common law immunity from suit. *Turner v. United States*, 248 U.S. 354 (1919); *United States Fidelity & Guaranty*, 309 U.S. 506 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Under traditional principles of sovereign immunity, an exception exists where a

CONCLUSION

This case goes to the core concern of preemptive federal Indian law—protecting tribes from assertions of state authority over tribal activities on tribal trust lands. Federal preemption is especially complete where state taxation of Indians is involved. This is not a case like *Caterpillar*, where the claim was unrelated or at most tangential to the area of federal preemption. Since federal law completely preempts state authority over Indian tribes on tribal trust lands, this case "arises under" federal law and was properly removed.

The judgment below should be affirmed.

Respectfully submitted,

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complaint alleges that named government officials acted outside the authority the sovereign is capable of bestowing. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

Applied to tribal sovereign immunity, this principle would enable suits to be brought in federal courts under 28 U.S.C. § 1331 against tribal officials to enjoin conduct allegedly outside the scope of the lawful authority of those officials. *National Farmers Union v. Crow Tribe*, 471 U.S. 845, 856 (1985). *See Tenneco Oil v. Sac & Fox Tribe*, 725 F.2d 572 (10th Cir. 1984); *Babbitt Ford Inc. v. Navajo Tribe*, 519 F. Supp. 418, 424-25 (D.Ar. 1981), *aff'd in part, rev'd in part*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984). This approach would not authorize federal court interference with respect to the propriety or manner tribes exercise their authority, but it would provide a federal forum for testing acts of those officials alleged to be beyond their legal authority altogether.

No. 88-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

JAN GRAHAM, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE THE OTOE-MISSOURIA TRIBE OF INDIANS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

This case presents an issue of substantial importance to the Otoe-Missouria Tribe of Indians, a federally recognized Indian tribe located in the State of Oklahoma, which, like the Chickasaw Nation, operates gaming and other tribal enterprises within the Indian country free from State judicial and legislative control. Amicus Curiae Otoe-Missouria Tribe of Indians has obtained consent of the parties to file a brief in support of Respondents.

The United States Court of Appeals for the Tenth Circuit concluded on remand, as in the previous Tenth Circuit decision, that the subject matter of this case, involving as it does State pretensions to governmental authority over the Chickasaw Nation in conflict with the exclusively federal parameters defining the legal status of Indian tribes, is not one where a choice exists between equally applicable, legitimate and concurrent federal and state law claims, such as were involved in *Caterpillar Inc. v. Williams*, 482 U.S. ___, 96 L. Ed. 2d 318 (1986), and where the Plaintiff, as master of his claim is free to choose the one and ignore the other relying on the body of law of his preference to ground his cause of action. Rather, the Tenth Circuit concluded, in essence, that the extent of governmental authority legitimately exercised by States over Indian tribal governments is exclusively referenced by federal, not state law. And, as such, the Oklahoma Tax Commission's radical assertion of State governmental authority over the Chickasaw Nation referencing only State law in an action filed in the District Court of Murray County, Oklahoma is essentially asserting a federal claim regardless of the Tax Commission's characterization of its cause of action resulting in the artful pleading doctrine thwarting the Tax Commission's choice of a State forum. The Tenth Circuit further concluded that the Tax Commission's complaint was not "well-plead" and the complaint falling within a preempted field of law, as it does, arises under federal law. In that the Tenth Circuit's decisions are grounded on the principle that state law does not exist as an independent source of State governmental jurisdiction over the Chickasaw Nation, the Tenth Circuit's decisions are square with *Caterpillar*'s holding that the complete preemption

corollary to the well-pleaded complaint rule raises federal preemption, particularly in Indian cases, as substantive federal law and not as a defense.

At this point, in order to place the interest of the Otoe-Missouria Tribe of Indians as amicus curiae in perspective, a characterization of what is at stake is appropriate. This case presents an attempt by an agency of a State to extend the legislative and judicial jurisdiction of a state government over an Indian tribe specifically in the form of a tax on tribal activities and subjecting the Tribe to the coercive jurisdiction of state courts to enforce the tax in avoidance of federal law and longstanding federal and tribal interests. Incredibly, the State agency urges a rule herein that would bar Indian tribes from removing such extra-legal actions to federal courts and require adjudication in State courts, which have been declared by force of federal law to be jurisdictionally deficient in these circumstances. *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1978); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971); *Three Affiliated Tribes v. Wold Engineering, Inc.*, 476 U.S. 877 (1986). The seemingly apparent motive is to "shop" a more friendly forum.

At issue, then, is the sovereignty of Indian tribes. In *M'Culloch v. Maryland*, 4 Wheat 316, 4 L. Ed. 579, 607 (1819), this Honorable Court, in considering the dividing point between federal and state authority, said that "the power to tax involves the power [of a state] to destroy" in that inevitably the entity subject to the power must depend ultimately upon the discretion of the State government for its very existence. The logical extension of the rule urged herein by Petitioner would necessitate a finding

that the power to define the limits of tribal sovereignty exists inherently by virtue of State action independent of federal sanction. This unacceptably high price to tribal sovereignty simply cannot be reconciled with Congress' jealous regard for Indian self-governance. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

A decision that bars Indian tribes from claiming the traditional protection of federal courts in removal actions strikes at the very heart of federally protected tribal sovereignty and its foundation in federal, not state, law. For these reasons, the Otoe-Missouria Tribe of Indians has an essential and compelling interest in the outcome of the case at bar.

I. THE LOWER COURTS CORRECTLY RULED THAT THIS CASE WAS PROPERLY REMOVED FROM STATE COURT SINCE UPON THE COMMENCEMENT OF THIS ACTION THE STATE DISTRICT COURT WHOLLY LACKED SUBJECT MATTER JURISDICTION OVER THE CHICKASAW NATION INVOLVING ACTIVITIES WHICH OCCURRED IN INDIAN COUNTRY.

Amicus submits that the case was properly removed and that federal question jurisdiction compliance with 28 U.S.C. § 1446(e) effects the removal. Nothing further is required to vest the federal district court with jurisdiction. *Butler v. King*, 718 F.2d 486 (5th Cir. 1986). After removal, the federal district court may exercise its threshold jurisdiction to determine jurisdiction of the state court. *Chicot Co. Drainage v. Baxter State Barnk*, 308 U.S. 371, 376 (1940); *Minnesota v. United States*, 305 U.S. 382, 389 (1939). If subject matter jurisdiction is exclusively within the state court's jurisdiction, the court will order remand.

However, if diversity of the parties or federal question jurisdiction is present the case will remain with

the federal court unless such court is without subject matter or in personam jurisdiction, in which case the complaint will be dismissed. Additionally, if the state court lacks either personal jurisdiction or subject matter jurisdiction over the cause of action the federal district court will dismiss the action. Jurisdiction of the federal court on removal is in a limited sense a "derivative jurisdiction". *Minnesota*, supra at 389; *Lambert Run Coal Company v. Baltimore Railroad & O.R. Co.*,258 U.S. 377, 383 (1922); and the federal court is required to dismiss rather than remand even though the federal court may have had original jurisdiction had the case initially been filed with the federal court. This is the posture in which the circuit court placed the present case.

II. FEDERAL QUESTION JURISDICTION ARISING OUT OF FEDERAL COMMON LAW, FEDERAL STATUTES, AND THE CONSTITUTION APPEARS ON THE FACE OF THE COMPLAINT.

While Indian tribal sovereignty predates the formation of the United States, it was expressly acknowledged in the Commerce Clause, Article I, Section 8, Cl. 3 which provides that Congress "regulate commerce . . . with the Indian tribes." Decisions interpreting this provision have come from what is known as the federal common law as it relates to Indian tribes. The common law comprises the body of those principles and rules of action, relating to the government and security of persons and property which derive their authority solely from usages and customs of immemorial antiquity or from judgments and decrees of the Court recognizing, affirming and enforcing such usages and customs. *Western Union Tel. Co. v. Call Publishing Co.*, 181 U.S. 92 (1901). For the most part, this and the lower federal courts

have carved out the meaning of this doctrine through the years commencing with decisions beginning with *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823) through *California v. Cabazon Band of Mission Indians*, 480 U.S. ___, 94 L. Ed. 2d 244 (1987). However, federal courts have not wavered from the concept that lack of subject matter jurisdiction prevents the courts from litigating questions raised before them.

Title 28 U.S.C. § 1441 and 28 U.S.C. § 1331 are governing statutes for removal to federal court. While it appears that this Court has not addressed 28 U.S.C. § 1441 in regard to Indian tribes, it has addressed 28 U.S.C. 1331 and the applicability of federal common law as a basis for federal question jurisdiction as it relates to § 1331. The test for each of these statutory provisions is essentially the same. *Crawford v. East Asiatic Co.*, 156 F. Supp. 571 (D.C. Cal. 1957).

This question first arose in the context of Indian law in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974) where federal question jurisdiction for the purposes of § 1331 was challenged. This Court stated:

> There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law and absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.

See also The New York Indians, 5 Wall 761, 769, 18 L.Ed. 708 (1866).

Here the Petitioner is obviously trying to impose laws arising from state statutes in an attempt to vest the state district court with subject matter jurisdiction over the Chickasaw Nation. The sovereignty of a state extends to everything that exists by its authority or is introduced by its permission. The Indian tribes do not exist by virtue of state action and the tribal powers are not vested by state action nor is permission from the state necessary for the exercise of tribal powers. The only inquiry therefore in this case is whether there is a state law question, independent and separate from federal law which can be resolved in state court. If it be not then the action is void ab initio. If it be so then the action is valid. However, there are no federal statutes which make Oklahoma's statutory or decisional laws applicable to the Chickasaw Nation in its activities on trust lands and therefore Oklahoma courts are not vested with subject matter jurisdiction to hear Petitioner's complaint. Therefore the controlling law in these matters remains federal law. *Oneida*, supra at 414 U.S. at 674. The "underlying right," if it exists, to vest Oklahoma courts with subject matter jurisdiction to impose Oklahoma's tax laws on the Chickasaw Nation arises not from the Oklahoma statutes cited in Petitioner's complaint, but rather from federal law, the existence of which is to be determined by the federal district court upon removal. Clearly, the underlying right to the claim asserted by the Petitioner has its very underpinning in federal law, not state law. The State cannot confer subject matter jurisdiction upon itself to enforce its laws on the Chickasaw Nation. Indeed this right may only be conferred upon the State by Congressional enactment. Such an underlying right must come from such an enactment and may never

have its origins in state law. The complaint in asserting a right to impose state law upon the Chickasaw Nation in the absence of subject matter jurisdiction over the cause conferred by federal law, facially presents federal question jurisdiction based on federal common law and statutes.

III. THE WELL-PLEADED COMPLAINT RULE IS INAPPLICABLE IN THIS CASE SINCE THE STATE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS CAUSE OF ACTION AND ANY ACTION TAKEN BY THE STATE COURT WOULD THEREFORE BE VOID FROM ITS INCEPTION.

This court stated in *Caterpillar v. Williams*, 482 U.S. ___, 96 L.Ed.2 318, 329 (1986) that:

> The [well-pleaded complaint] rule makes the Plaintiff the master of his complaint; he or she may avoid exclusive federal jurisdiction by exclusive reliance upon state law.

In the instant case, the Petitioner was obviously attempting to avoid federal court jurisdiction by pleading only state statutes as a jurisdictional basis for its cause of action against the Chickasaw Nation. The only federal question presented in this case is whether the state district court may unilaterally augment its jurisdiction by issuing orders to federally recognized Indian tribes such as the Chickasaw Nation in actions arising within Indian country. After this Honorable Court's decisions in *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1978); and *Kennerly v. District Court*, 400 U.S. 423 (1971), this question undoubtedly presents a substantial federal question on the face of the action in the state district court. The issue raised on the face

of such an action in state district court is the question of subject matter jurisdiction and only incidentally sovereign immunity. This federal question is obvious from a mere reading of Petitioner's complaint which names the Chickasaw Nation as a defendant and such federal questions may only be determined by a federal court. Oklahoma courts lack subject matter jurisdiction when the question presented regards actions of an Indian tribe in Indian country.

Oklahoma has never taken the requisite steps to assume jurisdiction, either civil or criminal, over matters arising in Indian country among Indian people. Absent such action Oklahoma has no subject matter jurisdiction over Indian people in Indian country. The question for decision is whether the state district court and the Oklahoma Tax Commission acting through this judicial forum is seeking to extend the judicial and legislative authority of the State against the Chickasaw Nation. Also, such action is completely preempted by Congressional enactment of the Act of August 15, 1953, 67 Stat. 588, as amended, 28 U.S.C. § 1360, which is commonly referred to as Pub. L. 280 and its 1968 amendments in Title IV of the Civil Rights Act of 1964 to require that all subsequent assertions of jurisdiction by states be preceeded by tribal consent Pub. L. 90-284, §§ 401, 402, 406, 82 Stat. 788, 25 U.S.C. §§ 1321, 1326 such actions are therefore removable to the United States District Court for the Eastern District of Oklahoma. Even had Oklahoma taken the necessary steps to acquire jurisdiction over Indian country, Pub. L. 280 was never intended to give subject matter jurisdiction to a state to bring an action against a federally recognized Indian tribe. In the case of *Three Affiliated*

Tribes v. Wold Engineering, Inc., 476 U.S. 877, 90 L.Ed.2d 881, 894-895, (1986), this Court stated:

> Pub. L. 280 certainly does not constitute a 'governing Act of Congress' which validates this type of interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance. We explained in Bryan v. Itasca County, 426 U.S. 373, 387-388, 48 L Ed 2d 710, 96 S. Ct. 2102 (1976):
>
> 'Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation. . . . [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' United States v. Mazurie, 419 U.S. 544, 557 [42 L.E.2d 706, 95 S. Ct. 710] (1975) . . . The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c) [28 U.S.C.S. § 1360(c)], providing for the 'full force and effect' of any tribal ordinances or customs 'heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with

> any applicable civil law of the State,' contemplates the continuing vitality of tribal government.' (Footnote omitted).

Therefore an Oklahoma state court has no subject matter jurisdiction, in the absence of an express delegation of such authority to the State by Congress to enforce its laws upon an Indian tribe. If there is such authority for Petitioner to enforce its laws over the Chickasaw Nation, Petitioner should have alleged this authority in its complaint as a jurisdictional basis for its authority to impose its laws on the Chickasaw Nation. Petitioner failed to do so and this in and of itself renders Petitioner's complaint not well pleaded since the complaint on its faces alleges no jurisdictional basis for Oklahoma to impose its laws upon the Chickasaw Nation. Therefore the well-pleaded rule is not an issue in this case. Likewise this is a case in which a federal court would have original jurisdiction to determine if state tax laws may be applied to the Chickasaw Nation.

IV. PETITIONER'S COMPLAINT IS AN UNSUCCESSFUL ATTEMPT AT "ARTFUL PLEADING."

While not expressly characterizing Petitioner's complaint as "artful pleading," the circuit court clearly found that the Petitioner was attempting to conceal a necessary cause of federal action for the purpose of closing off the Chickasaw Nation's access to a federal forum. Judge Moore in his first opinion in this case said:

> The substance of the State's claim embraces the central jurisdictional issue we must decide in this case. Indeed, when we strip the State's claim of its statutory baggage, we are

> left with an action in which the State is attempting to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe.
>
> This recognition underscores the implicit federal question lodged and focuses our inquiry [citations omitted] 822 F.2d 951, 954.

This Court acknowledged the "artful pleading" rule in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 (1981). In footnote 2 of Justice Rehnquist's opinion for this Court, he stated:

> . . . as one treatise puts it courts 'will not permit plaintiffs to use artful pleading to close off defendants' right to a federal forum . . . occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiffs characterization', 14 C. Wright A. Miller & Cooper, *Federal Practice and Procedure*, § 3722 pp 564-566 (1976) . . . the District Court applied that settled principal to the facts of this case. . . .

The recitation of a series of state statutes and couching the language of the complaint in terms of state law should not render the federal courts blind so that they may not use logic to deduce elements of a federal claim implicit on the face of a complaint nor should such practice be allowed to defeat or frustrate the intent of Congress. Yet this is exactly what the Petitioner has done in the instant case. Knowing that there is no Congressional enactment authorizing such an action against an Indian tribe, Petitioner simply pleaded state statutes as a basis for jurisdiction. However, the one element that the Petitioner could not conceal from the court was the naming of the Chickasaw Nation as a defendant, immediately raising a federal question which is exactly the nature of the circumstances stated above by Justice Rehnquist in *Moitie*, supra.

V. PETITIONER'S CLAIM IS COMPLETELY PREEMPTED BY FEDERAL LAW AND THEREFORE STATE COURTS LACK SUBJECT MATTER JURISDICTION TO ADJUDICATE THE RIGHTS OF AN INDIAN TRIBE IN INDIAN COUNTRY.

In regard to subject matter jurisdiction of state courts to adjudicate questions involving Indian tribes in Indian country the area has been completely preempted by acts of Congress. The concept of complete federal preemption is most clear when the subject is totally and absolutely dependent on the will of Congress as is the case with Indian tribes. However, in *Caterpillar* this Court, citing *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) stated:

> There does exist however, an 'independent corollary' to the well pleaded complaint rule . . . known as the 'complete preemption doctrine. On occasion, the court has concluded that the preemption force of a statute is so 'extraordinary' that it converts an ordinary state common law complaint into one stating a federal claim for the purposes of the well pleaded complaint rule. Once an area of state law has been completely preempted, a claim based on that preempted state law is considered, from its inception, a federal claim and

> therefore arises under federal law. See Franchise Tax Board . . . ('If a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under federal law').

The State's claim is in all aspects an assertion of state governmental authority over the Chickasaw Nation, as distinguished from the numerous state common law and contract claims upon which the Petitioner has based his argument. In other words, Petitioner's claim is that State law authorizes the exercise of legislative and judicial authority over the Chickasaw Nation. Therefore, any action instituted in a state court against an Indian tribe, prima facie, raises a federal question which is within the exclusive jurisdiction of the federal court to determine the width and breadth of federal preemption of state action.

In effect the State's claim is not a claim under state common law but a claim of governmental authority over an Indian tribe which necessarily implicates only federal law. The mere filing of such an action asserting state authority in a state court on its face is grounds for federal removal. Congress' intent that federal law control the elements of the Petitioner's claims to governmental authority over the Chickasaw Nation is clear from the face of the regulatory plan adopted in Pub. L. 280 in that Congress could not have intended to replace the positive federal law in this area with state law except in accordance with Pub. L. 280 and equally important, because the governing law regarding subject matter jurisdiction of state courts over Indian tribes has already been judicially determined by this Honorable Court.

The frustration of being confronted by a preemption analysis regarding the validity of a plaintiff's claim and a rule which instructs against accepting it in a federal question context is more easily resolved in cases such as the present into which almost 200 years of federal substantive law controls this area of the law and is plenary. Therefore state control of the same area is nonexistent. The extent of governmental authority over Indian tribes legitimately exercised by states is exclusively referenced by federal, not state law. The exercise of governmental authority over Indian tribes is not traditionally left to state law. Rather the government scheme is set forth in Pub. L. 280 and in the judicial determinations of this Court. The ordinary situation presents claims otherwise under state law, or competing claims between federal and state law as it applies to the same area of inquiry wherein the Plaintiff has a choice of forums depending on which law the Plaintiff chooses to plead. This is not the case when only a federal forum is available to the Plaintiff (here the State of Oklahoma) in an assertion by the State that its taxation laws are the governing laws regarding taxation over an Indian tribe, in absence of specific Congressional authority to do so.

The Indian law case herein provides a less troublesome aspect of the principles of the well-pleaded complaint rule since there is no body of state law which could be applied in the instant case. Therefore, this is a situation where the corollary rule of the well-pleaded complaint rule is most appropo since the entire body of Indian law is based on statutes, court decisions and the federal common law. This situation is unique in that all other cases which have come to

amicus' attention have involved fact situations based on state common law schemes or by breach of contract action. The corollary rule is particularly cogent in Indian law cases in which courts are being called upon in situations where states are competitors with the Indian tribes and the federal government for governmental authority in Indian country. The Tenth Circuit's decision in the case does no violence to the rule of *Caterpillar*, supra. Rather, it simply follows the rule of "artful pleading" and the test set forth in *Franchise Tax Board*, supra.

It is clear that Petitioner's complaint fails to expressly allege that the activities against which it obtained a temporary restraining order were being conducted by the Chickasaw Nation in Indian Country. Situations such as this necessitate the complete preemption corollary. Otherwise Petitioner could frustrate the will of Congress by attempting to conceal a necessarily federal claim.

Petitioner cites 68 O.S. § 232 which authorizes injuntive relief to enforce state tax laws as authority for this suit.[1] The federal statute authorizing state court jurisdiction over Indian country is the Act of August 15, 1953, 67 Stat. 5888, as amended, 28 U.S.C. § 1360 and 25 U.S.C. § 1322, commonly known as Pub. L. 280. Amicus submit that this statute and federal common law completely preempts the petitioner's state statutory cause of action against Indian tribes. In *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 884-885 (1986), Justice O'Connor speaking for the majority of the Court said:

[1] This is especially noteworthy in light of the fact that the asserted State law does not include Indian tribes in the definition of entities to be taxed.

> "Public Law 280 represents the primary expression of federal policy governing the assumption by states of civil and criminal jurisdiction over the Indian Nations . . .
>
> . . . In examining the effect of comprehensive legislation governing Indian matters such as this, "our cases have rejected a narrow focus on congressional intent to preempt state law as the sole touchstone. They have also rejected the proposition that preemption requires 'an express congressional statement to effect'. [omitting citations]
>
> . . . Rather, we have found that where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled preempted by federal law." [omitting citations]

This statement by the Court manifestly shows that Congress has expressed its intent to completely preempt state law relating to state court jurisdiction over state causes of action against Indian tribes. Oklahoma has never met the requirements of Pub. L. 280. Petitioner's blatant attempt at an application of state statutes in a state court to enjoin tribal activities is completely incompatible with the preemptive force of congressional prerogative.

Simply naming an Indian tribe as a party defendant in a suit immediately raises the issue of subject matter jurisdiction. The Congress could have hardly stated its policy of federal preemption over matters of Indian law with more clarity than by way of Pub. L. 280. Petitioner has been greatly perturbed and generally

unwilling to accept the fact that federal law determines the State's course of action in regard to Indian tribes. This sort of unwillingness was early on noted in the case of *United States v. Kagama*, 118 U.S. 317, 383 (1886) wherein this Court stated: "Because of the local ill feeling the people of the states where they [Indian people] are found are often their deadliest enemies." This seems to be true in regard to Petitioner Oklahoma Tax Commission, since winning few, if any, cases against Indian tribes and people in Oklahoma has seemed to fuel Petitioner's interest in filing more and more litigation against Indian tribes and people in a seemingly concerted effort to diminish the rights and privileges which Indian tribes and people enjoy in Indian country.

In the case of *Oneida Indian Tribe v. Oneida County*, 414 U.S. 661 (1973) the question involved federally protected land, but the holding is no less relevant to the question of lack of subject matter jurisdiction by the state court. "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent statutory guidance, the governing rule of decision would be fashioned by federal court in the mode of the common law." 414 U.S. 661, 674. Therefore, even if the federal statutes did not completely preempt state court jurisdiction it is clear that federal common law would do so since there is no federal statute making Oklahoma's statutes governing this type of taxation and injunctive relief applicable to Indian tribes. Petitioner's asserted right to enforce its laws via coercive state court jurisdiction and, as the case was here, the court's predisposition to exercise its

"jurisdiction" by ex parte injunctive relief, is inconsistent with this Court's frequent holding that Congress retains plenary discretion to decide when such right may exist. Complete preemption necessitates federal court jurisdiction to adjudicate whether subject matter jurisdiction exists in the state courts.

VI. THE CHICKASAW RESERVATION IN OKLAHOMA HAS NOT BEEN DISESTABLISHED BY CONGRESS.

Amicus now turns to Petitioner's novel theory that Oklahoma Indian tribes are less deserving of governmental recognition and attending attributes than other tribes in the United States. This Court in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) reiterated the rule that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plats within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". [citing *United States v. Celestine*, 215, U.S. 278, 285, (1909)]. Simply alloting the lands out in individual plats within the area does not change its reservation character.

Amicus have studied the legislation resulting in alloting the Chickasaw lands in severalty and preparing for Oklahoma's admission as a state and find no expression on the part of Congress to disestablish the tribe's reservation. Essentially these Acts of Congress provided for allotments in severalty to tribal members and sales of surplus lands for an undisclosed sum to be deposited for the benefit of the tribe. The tribe retained some lands including schools, churches, tribal government buildings, mineral rights, etc. It continues today, to own considerable surplus lands that were not sold. There is no doubt that the sale of surplus land was for the purposes of facilitating non-Indian

settlement on the reservation but that does not manifest congressional intent to disestablish it. The dealings with the Chickasaw were akin to the situation in *Mattz v. Arnett*, 412 U.S. 481 (1973) where the Court held that an Act which provided for opening lands for settlement, alloting tracts to tribal members and sale of the surplus for an undisclosed sum to be deposited for the tribes benefit did not evidence an intent to terminate the reservation status of the entire area. It cannot be denied that most members of Congress at the time of the Chickasaw allotment process thought that this would eventually terminate tribal existence. But, as this Court said in *Solem* at 468, "the Congresses that passed the Surplus Land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process. We have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations . . ."

A few years later the country began to take a dim view of these former termination policies. The advent of this new policy, as it related to the Chickasaws, came with the Oklahoma Indian Welfare Act of 1936. The OIWA stopped the allotment of Oklahoma's Indian lands and allowed the tribes to reorganize their shambled governments. This brings us back to the Curtis Bill, supra, which is the Petitioner's primary authority for the proposition that Congress has disestablished all reservations in Oklahoma making it an "assimilated state." It is apparent that Petitioner is not aware of *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988) where the Court held that the OIWA repealed the Curtis Bill for all purposes. Reversing the district court's holding that the Creek

Nation had no power to establish tribal courts with civil and criminal jurisdiction, the circuit court said:

> It (OIWA) appears to cover the 'whole subject' of the earlier legislation. It would be absurd to hold that isolated portions of the Curtis Act . . . survive even through the statutory context in which they appeared—allotment and assimilation—has been stripped away by OIWA, at 1445.

Whatever the Congress might have done earlier the notion of Oklahoma being an "assimilated state" was laid to rest in 1936.

Regardless of the destruction of the tribe's land base due to the assimilationist and termination policies of the United States in the late nineteenth century and contrary to the erroneous statement by Petitioner on page 23 of its brief, the tribal government remained intact and the federal government retained jurisdiction over them. The Five Civilized Tribes Act of April 26, 1906, 34 Stat. 137 § 28 expressly provided that the tribal governments were continued "until otherwise provided by law." While it is true that the tribal governments were much restricted by these congressional acts and were not very effective for several years thereafter, it is clear that the tribal governments were to remain. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911).

The executive branch recently recognized the continual existence of the treaty boundaries of the Chickasaw Nation when the Secretary of the Interior approved its present constitution in 1983. The pream-

ble of the Chickasaw Constitution "establishes the tribal government "within the . . . limits" of the original reservation. Sulphur, Oklahoma, and the Chickasaw Motor Inn are within those limits. Petitioner's assertion that the Chickasaw reservation has been disestablished is without merit. Even had it been, that situation was reversed by the OIWA.

VII. STATE COURTS LACK SUBJECT MATTER JURISDICTION OVER INDIAN TRIBES AS TO MATTERS ARISING IN INDIAN COUNTRY.

This Court does not have to decide whether the original Chickasaw reservation in Oklahoma has been disestablished. The question of whether the conduct of Indians has occurred on "Indian country" has increasingly become the benchmark for allocation of federal, tribal, and state civil and criminal jurisdiction. *California v. Cabazon Band of Indians*, 107 S.Ct. 1083, 1087 & N.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 & N.2 (1971); *Indian Country U.S.A. Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) cert. denied sub nom; *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, 108 S.Ct. 2870 (1988). See also Felix S. Cohen, *Handbook of Federal Indian Law* 5-8 (1942). Congress has defined "Indian country" for purposes of determining federal criminal jurisdiction in 18 U.S.C. § 1511(a) (1948) to include "all land within the limits of any Indian reservation under the jurisdiction of the United State Government, . . ." The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1903(10) provides:

> Reservation means Indian country as defined in section 1151 of title 18 and any lands, not covered under such action, title to which is either held by the United States in trust for

> the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

Recently Congress passed Senate Bill 555, Indian Gaming Regulatory Act, reported on September 15, 1988, Congressional Record - Senate S 12657. Section 4(4)(B) defines "Indian lands" as:

> Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power.

Section 23 of this act uses the term "Indian country" instead of "Indian lands" a number of times.

This Court has designated lands as "Indian country" where title was held in a variety of ways. *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Chavez*, 290 U.S. 357, 364 (1933); *United States v. John*, 437 U.S. 634, 649 (1978). The principal test applied by the courts is found in *Pelican* at 439, i.e. tribally-owned lands "devoted to Indian occupancy . . . validly set apart for the use of Indians". This includes lands held in trust for a tribe by the United States, *John* at 649. This is also the test applied in at least four circuits. *United States v. Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985); *Langly v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985); *United States v. Agure*, 801 F.2d 336 (8th Cir. 1986); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-668 (10th Cir. 1980); See also *State of Washington v. Sohappy*, 757 P.2d 509, 511 (Wash. 1988).

The Petitioner apparently made the same argument to the Circuit Court in *Indian Country, U.S.A.*, supra, that it does here, i.e. the Creek Nation reservation had been disestablished. The Court here said at 975 N.3:

> The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not. Our inquiry is narrower: whether Congress has divested the unallotted Creek tribal lands of their Indian country status. The disestablishment question is primarily important for determining the status of non-Indian lands, which remain Indian country under 18 U.S.C. § 1511(a) until the surrounding portion of a reservation is disestablished. *Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment.* [emphasis supplied] See, e.g., *Solem*, 465 U.S. at 467 n.8, 104 S.Ct. at 1164 n.8; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085.

The term "reservation" and "Indian country" are used interchangeably by the Congress and the courts. The primary meaning of both terms is to describe federally-protected Indian tribal lands. *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) at 35 n.66. Thus, the terms "Indian country" and "reservation" have come to mean "those lands which Congress has set apart for tribal and federal jurisdiction". *Indian Country, U.S.A.* at 973. It should be noted that the Oklahoma Supreme Court has also recognized the importance of this classification:

> The touchstone for allocating authority among the various governments has been the concept of 'Indian Country', a legal term delineating the territorial boundaries of federal, state, and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained.

Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625, 627 (Okl. 1983). See also *State v. Burnett*, 671 P.2d 1165 (Okl. Cr. 1983).

The Chickasaw Motor Inn property was conveyed to and accepted by the United States in trust. (JA 16) This was done for reasons that should be obvious. It was the intent of both the Chickasaw Nation and the United States that this tract of land would be removed from the jurisdiction of the State of Oklahoma. The Petitioner has had much difficulty in accepting this but as the Court said in *Oneida*, at 678:

> There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians.

Mescalero, supra, upon which Petitioner basically rests its whole case, when coupled with the obiter dicta found in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943) should not be applied here for several reasons. First, subject matter jurisdiction from suit was not at issue there. Second, the leased

lands involved in *Mescalero* were located outside tribe's recognized reservation. The Chickasaw Motor Inn is located within the exterior boundaries of its original reservation, Treaty of 1837, and the territorial boundaries for its present day government which have been approved by the federal executive department. Chickasaw Constitution, preamble. Third, New Mexico's Enabling Act makes a distinction between on and off reservation activities for taxing Indian tribes. *Mescalero* at 149-150. Oklahoma's Enabling Act has no such provision. Congress expressly granted New Mexico more powers over Indians than it did Oklahoma. Oklahoma's authority is restricted to the power given it by federal common law. The issue there was whether the area was on or off a "reservation" not whether the area was "Indian country". Footnote 11 at 155 of the Court's opinion contains dicta which indicates the leased lands would be accorded the same "Indian country" status as lands purchased by or conveyed in trust to the United States. However, this conclusion was reached in an entirely different context than here. There the issue was whether taxes might be applied to both the improvements on the land and income therefrom. Here the issue is whether the courts' have subject matter jurisdiction. Last, *Oklahoma Tax Commission*, supra, was decided in 1943. This was before Congress changed the definition of Indian Country in 1948 at 18 U.S.C. § 1151. The 1948 amendment and this Court's decisions clearly accord Indian lands in Oklahoma the same status as reservation lands in other states. *State v. Littlechief*, 573 P.2d 263 (Okl. Cr. 1978).

In *Mescalero*, the lands were not owned by the tribes but merely leased with perhaps, the thought

by the tribe that it would be immune from taxation as a federal instrumentality. In the present case the Chickasaw Nation first owned the lands in question. They subsequently conveyed them to the United States who accepted them in trust. Amicus submit that this was accomplished with the calculated intent on both parties to cause the property to be unquestionably "Indian country" free of taxation and regulation by the state and under the control and jurisdiction of the tribe and the federal government.

Lastly, if *Mescalero* stands for the proposition that lands acquired in trust under 25 U.S.C. § 465 and § 501 do not merit "Indian country" and "reservation" status, then that aspect of the decision was overruled by *John*, supra, five years later.

Petitioner contends that causes arising out of tribal conduct on "Indian country" should not deprive state courts of subject matter jurisidction because it interferes with its Tenth Amendment rights. Petitioner asserts that "Congress has sought to wield its power in a fashion that would impair the State's ability to function effectively in a federal system. This is in reference to the application of 18 U.S.C. § 1151 for purposes of civil jurisdiction. Its whole argument on this subject is meritless and fails for a number of reasons, the first of which is that there are other definitions of "Indian country." See *Pelican, McGowan, John*, etc., supra.

The Tenth Amendment rights asserted by Petitioner pale when tribal autonomy and the unique trust relationship tribes have with the federal government is considered. Accordingly, the Court has consistently declared that the authority of Congress over Indian tribes is plenary. The plenary congressional control

over Indians is necessary to fulfill the federal trust responsibility. These principles have been reaffirmed so many times cited authority is not necessary. The Oklahoma Supreme Court has accepted the term plenary to mean "full, entire, complete, absolute, perfect and unqualified". *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okl. 1942); *see also* The Federalist No. 42 by Madison, Tudor Publishing Co., (1937) P. 285, 290. And, as this Court said in *Seber* at 718, supra, "the fact that the Acts . . . may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress not the Courts."

Oklahoma's Enabling Act retained federal control and law making powers regarding the State's Indians and Indian tribes. *Mashunkashey* at 979, *Ex Parte Webb*, 225 U.S. 663, 677 (1912).

CONCLUSION

For the above state reasons the decision of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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December 16, 1988

No. 88-266

In The

Supreme Court of the United States

October Term, 1988

Oklahoma Tax Commission,

Petitioner,

v.

Jan Graham, *et al*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE, IN SUPPORT OF RESPONDENT, OF THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES

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BRIEF AMICUS CURIAE, IN SUPPORT OF RESPONDENT, OF THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES

This brief *amicus curiae* is filed, in support of Respondent, by the Inter-Tribal Council of the Five Civilized Tribes, with the consent of both parties.

INTEREST OF AMICUS CURIAE

The instant case raises central questions concerning removal of suits by states, seeking to advance their sovereignty *vis-a-vis* that of federally-recognized Indian tribes, in state court. This question, in turn, raises related issues concerning the potency of the federal interest (pursuant to the federal trust responsibility) both in tribal sovereign immunity, and in state civil jurisdiction relating to Indian activities within Indian country. Moreover, Petitioner Tax

Commission has advanced a broad, wide-ranging theory that tribal sovereignty has been extinguished in Oklahoma, that consequently, no Indian country is left therein, and that state law, presumably part and parcel, applies to all Indian people, tribes, and lands in Oklahoma. Ancillary to this approach, the Tax Commission asserts that Congress lacks constitutional authority to shield Indian tribes from noncriminal state jurisdiction insofar as this Court has placed that interpretation on 18 U.S.C. § 1151.

The Inter-Tribal Council of the Five Civilized Tribes was organized on February 3, 1950, and is comprised of the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Seminole Nation, and the Muscogee (Creek) Nation, which were long ago removed to Oklahoma under circumstances which are now well known. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-26 (1970). The Inter-Tribal Council, in representing these Indian Nations, represents tribes which are not only the largest in Oklahoma, but among the largest in the United States. As such, and as the representative of tribes whose sovereignty and integrity have been retained after long and arduous historical struggle, the Inter-Tribal Council resists the Tax Commission's characterization of its tribal components' sovereignty as "extinguished," their reservations as "disestablished," their citizens as "assimilated," their former governments as "non-American [and] radically wrong,"[1] and their current governments as "dethroned." *See* Brief of Petitioner at 13, 16, 32. The Inter-Tribal Council is also appalled at the Tax Commission's apparently approving and uncritical citation of a

[1] In this context, the Inter-Tribal Council calls this Court's attention to *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *petition for cert. filed*, 1988 WL 72544 (U.S. Nov. 12, 1988) (No. 87-5377). In that case, the court noted that "[t]hese tribes are known collectively as the Five Civilized Tribes because of their adaptability in developing institutions comparable in many respects to the European models. *Id.* at 1441 n.2 (citing V. Deloria Jr., and C. Lytle, *American Indians, American Justice* 86-87 (1983).

Dawes Commission report concluding that "a higher law than that of Congress destined [the Indians] to extinction as a race . . . ," Brief of Petitioner at 19, and believes that it has something to contribute regarding the Tax Commission's characterization of the Dawes Commission's activities as "statesmanship." *See Id.* at 38. Since the members of the Inter-Tribal Council will be affected not only by the substantive and procedural outcome of the instant case, but also by the broader ramifications of the Tax Commission's far-reaching and novel theories of law, it participates in support of the decision of the court of appeals in this case.

SUMMARY OF ARGUMENT

In his first dissent in this Court, Justice Holmes stated a proposition which may be applied, in part, with equal force to the instant case:

> Great cases like hard cases make bad law. For great cases are called great . . . because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what was previously clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

In the instant case, *amicus* believes that both the overwhelming and dominant nature of the federal interest in the field of Indian law generally, and, more specifically, the overwhelming dominance of the federal interest in the fields of tribal sovereign immunity and state civil jurisdiction over Indian activities in Indian country are, indeed, "well settled." Nevertheless, the Oklahoma Tax Commission *presents* this case as a "hard" one, asserting that, should it not prevail herein, it will be "barred from seeking a remedy" to enforce any rights which it may have, Petition for Certiorari at 8, and, moreover, that an adverse ruling from this Court "would impair the State's ability to function effectively in a federal system." Brief

of Petitioner at 31. *Amicus*, of course, does not suggest that Indian law cases as a group, involving their complex interplay of treaties, federal statutes, and federal common law are among the "easiest." Nor is it unaware that this case, involving the application, *inter alia*, of the "complete preemption" doctrine of *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968), and *Metropolitan Life Ins. Co. v. Taylor*, ___ U.S. ___, 107 S. Ct. 1542 (1987), and the "artful pleading" exception to the "well pleaded complaint" rule, *see, e.g., Federated Dep't Stores v. Moitie*, 452 U.S. 394, 397 n.2 (1981), to a state's attempt to impose its sovereignty over that of a federally-recognized tribe in an unconsented state court suit is, in its removal-jurisdiction aspects, one of first impression. *But see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("mirror image" of the instant case, in which a *tribe* successfully brought what might otherwise have been characterized as a common-law ejectment action in federal court).

In reality, however, this case, at least from the standpoint of Oklahoma's economic (and other) survival, is not as "hard" as the Tax Commission suggests. Contrary to its assertions, it is not without a remedy to enforce any rights which it may have. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 161-62 (1980), this Court recognized and validated state power – actually employed in that case – to seize unstamped cigarettes outside of Indian country, which were destined for delivery and sale therein. This power, not an empty one, led in direct and proximate fashion to the ultimate settlement achieved by California in the aftermath of the *Chemehuevi* cigarette sales tax litigation, whose final judicial chapter was written in *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 2184 (1987).[2]

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[2] In earlier stages of the *Chemehuevi* litigation, the tribe successfully asserted its sovereign immunity when confronted

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Regarding that portion of the Tax Commission's complaint seeking to assert its jurisdiction to tax the tribal bingo operation, J.A. 3, a different (but even less economically threatening) pattern emerges. This Court has held that tribal bingo operations stand on a legally distinct footing from tribal cigarette sales. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987). The distinction which this Court drew in *Cabazon Band* for regulatory jurisdiction purposes has been logically extended into the taxing jurisdiction context as well. *See, e.g., Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 982 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Comm'n v. Muscogee (Creek) Nation*, ___ U.S. ___, 108 S. Ct. 2870 (1988). In any event, attempts by the Tax Commission to impose gross receipts taxes upon tribal bingo operations have now been mooted by the Indian Gaming Regulatory Act, § 11(d)(4), ___ Stat. ___, 134 Cong. Rec. S12,657 (daily ed. Sept. 15, 1988).

The Tax Commission also seeks to tax the gross receipts from the Chickasaw Motor Inn and Restaurant. J.A. 4. The *per se* rule against state taxation of Indian tribes and tribal members regarding activities within Indian country is well known; accordingly, this Court has

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with an attempt by California to counterclaim for back taxes in an action for injunctive relief brought by the tribe. *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 & n.6 (9th Cir. 1985). The state sought certiorari regarding four questions, the last of which concerned the sovereign immunity ruling. *See* Petition for Certiorari, *id.* (U.S. July 22, 1985) (No. 85-130), "Questions Presented." This Court granted certiorari *only* on the first three questions presented. *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985), and reversed, in part, on other grounds. *Id.* Despite the continued vitality of the Ninth Circuit's sovereign immunity ruling, when confronted with the state's *Colville*-approved power to engage in seizures outside of Indian country, the tribe succumbed, and agreed, in a settlement, to collect the tax.

held that "it is unnecessary to rebalance those interests in every case." *Cabazon Band*, 480 U.S. 202, 215 n.17.[3]

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[3] *Amicus* is aware, of course, of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), in which this Court permitted New Mexico to impose a gross receipts tax on a tribally-operated ski resort located on land leased from the federal government for that purpose. *Jones*, however, is distinguishable from the instant case in numerous respects.

First, tribal sovereign immunity was not raised in that case.

Second, as the *Jones* Court itself noted, in certain areas of Indian law, generalizations have given way to individualized treatment of treaties and federal statutes, including statehood enabling legislation. *Jones*, 411 U.S. at 148. In New Mexico's Enabling Act, 36 Stat. 557, 559 (1910), Congress, *expressly speaking in reservation terms*, disclaimed any intent to preclude state taxation of *off-reservation* lands or property. Consequently, this Court concluded that "[i]t is thus clear that in terms of general power New Mexico retained the right to tax, unless Congress forbade it, all Indian land and Indian activities located or occurring 'outside of an Indian reservation.' " *Jones*, 411 U.S. at 149-50. Oklahoma's Enabling Act, 34 Stat. 267 (1906), is markedly unlike that of New Mexico. Aware of the quantity and breadth of Oklahoma Indian treaty guarantees providing, for example, that tribes would never be brought within the boundaries of any state, *see, e.g.*, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 771 & n.8, Congress, in the first paragraph of a lengthy statute, inserted a broad proviso "[t]hat nothing contained in said constitution shall be construed to limit or impair rights of *person or* property *pertaining to* the Indians of said Territories . . . ." 34 Stat. 267 (1906). Moreover, Oklahoma's general "disclaimer" proviso, unlike New Mexico's, neither speaks in "reservation" terms, nor disclaimed Congressional intent to preclude state taxation of Indian interests of any kind. 34 Stat. 267, 270. Two consequences flow from the above analysis: first, Oklahoma stands in a *less* favorable posture than New Mexico regarding taxation of Indian interests; second, any of this Court's analysis in *Jones* going beyond

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Thus, the Tax Commission's plaintive declarations concerning both the absence of any remedy available to

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its conclusion that the leased national forest land at issue there (which was, *unlike* the trust land at issue in the instant case, outside original reservation boundaries) was not a "reservation" *as defined by the New Mexico Enabling Act*, was unnecessary to the decision in that case.

Third, this Court's observation in *Jones*, 411 U.S. at 155 n.11, that "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself" in trust for the tribe, is clearly inapposite here. Apart from the obvious fact that the United States may well have wished to retain full, unencumbered ownership of that land, only leasing it to the tribe for a time certain, the *tribe*, not the United States, had prior fee ownership of the land at issue in the instant case. Thus, neither the decision of the tribe to convey the land to the United States in trust, nor the decision of the United States to accept it in trust, were "meaningless" acts in this case.

Fourth, assuming *arguendo* that any statements by this Court in *Jones* were neither *obiter* nor distinguishable, subsequent cases decided by this Court have modified the *Jones* footnote analysis regarding the true modern meaning of "reservation" status. *United States v. John*, 437 U.S. 634, 648-49 (1978); *see also United States v. Sohappy*, 770 F.2d 816, 822-23 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986); *State v. Sohappy*, 757 P.2d 509, 511-12 (Wash. 1988) (site may be "reservation" for purposes of state jurisdiction even where outside original reservation boundaries). The observation concerning *Jones* made in the first sentence of this paragraph is equally apposite to the Tax Commission's reliance on *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), a case apparently influenced by terminationist policy, *id.* at 74, *see also infra* at 26, and involving a Public Law 280 state. No reference was made in *Kake* to 18 U.S.C. §1151; in fact, this Court's statement in *Kake* that "state authority over Indians is yet more extensive over activities . . . not on any reservation," on which the Tax Commission relies, *see* Brief of Petitioner at 28, was made, depending on how the original passage is read, see *Kake*, 369 U.S. at 75, either utterly without

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it, and the consequent devastation of Oklahoma's "ability to function effectively in a federal system," should not be given great weight. What is *really* at stake from the Tax Commission's standpoint is its ability to, at most, invoke a judicial remedy *in addition to* the judicially-*sanctioned* self-help remedy of seizure outside of Indian country to collect its cigarette sales tax. *Amicus* urges this Court to refrain, in Justice Holmes' words, from viewing as "unclear" the "settled principles" concerning, *inter alia*, the overwhelming nature of the federal interest (pursuant to the trust responsibility) in preserving tribal sovereign immunity (which Congress has abrogated only selectively and with great care), recognized by this Court with a heretofore unwavering consistency, and the overwhelming nature of the federal interests, also pursuant to the trust responsibility, in *selectively* extending state civil jurisdiction over federally-recognized Indian tribes. *See, e.g.*, Public Law 83-280, 67 Stat. 588 (1953).

Amicus will further urge that both federal common law and federal statutory law may create a case "arising under" the laws of the United States. It will maintain that, in contrast to the Tax Commission's protestations, neither *Gully* nor subsequent caselaw established a one-dimensional standard of removal-jurisdiction review, and that the "legal realities" of a case, as manifest in the "complete preemption" "corollary" to the well-pleaded complaint rule, and the "artful pleading" exception thereto, are not irrelevant to the true characterization of the plaintiff's case for removal purposes. It will defend

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authority, or by reference to a 1940 law review article by Felix Cohen which does not support the proposition at all, *see id.* (referring to "Indian country," not "reservations"), or by reference to this Court's decisions *prior to the adoption of 18 U.S.C. §1151. Id.* It may also be noted that *Kake* was decided thirteen years prior to this Court's decision in *De Coteau v. District Court*, 420 U.S. 425, 446-47 (1975) (unequivocally applying §1151 in a noncriminal context to alloted land).

the proposition that the criteria for applying both exceptions are satisfied in the instant case. *Amicus* will further defend the alternative proposition that in any case, since tribal sovereign immunity is jurisdictional, rendering void any judgment (even where the defendant tribe does not appear) absent valid waiver, it is not properly characterized as a mere federal defense. *See, e.g., Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 318 (10th Cir. 1982). The decision of the court of appeals below, affirming the federal district court's refusal to remand the case to the Oklahoma district court was, therefore, correct.

Equally correct was the court of appeals' affirmance of the federal district court's decision to dismiss. The law in effect at the time at which this case was filed and removed to federal court provided for derivative jurisdiction only upon removal: where the state court lacked jurisdiction over the claim, the federal court acquired none, even where the case could otherwise have been brought in federal court. Here, the state court lacked subject matter jurisdiction (and may well have lacked *in personam* jurisdiction as well), since the state cannot give itself subject matter jurisdiction, and since both federal common law and the selective nature of congressional extensions of state court jurisdiction over Indian tribes and Indian country, reflected, *inter alia*, in the Termination Acts, Public Law 280, and the Indian Civil Rights Act of 1968, clearly evidence preemption of the field. *See, e.g., Kennerly v. District Court*, 400 U.S. 423, 426-27 (1971). The Tax Commission's startling assertions that Indian country does not exist in Oklahoma, and that, if it does, Congress, in pursuance of its trust responsibility, lacks constitutional authority to shield the tribes from noncriminal state jurisdiction (insofar as this Court has placed that interpretation on 18 U.S.C. § 1151) are wholly and utterly without merit.

ARGUMENT

I. THE TENTH CIRCUIT DECISION BELOW CORRECTLY AFFIRMED THE REMOVAL JURISDICTION OF THE FEDERAL DISTRICT COURT.

A. For Purposes of 28 U.S.C. §§ 1331 and 1441(b), "laws of the United States" Includes Federal Common Law as Well as Federal Statutory Law.

That an action which could be deemed to "arise under" federal law if based on federal statutory law will also be deemed to "arise under" federal law if based on federal common law, is now well settled. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972). That this premise extends to Indian law cases is reflected, *inter alia*, by cases such as *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851-53 (1985). In short, the federal common law/federal statute dichotomy constitutes a distinction without a difference for purposes of 28 U.S.C. §§ 1331 and 1441(b).

B. *Gully*, its Antecedents, and its Progeny, Establish no Ossified, Unidimensional Standard of Removal-jurisdiction Review.

"Although the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the action, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824), [this Court has] long construed the statutory grant of federal question jurisdiction as conferring a more limited power." *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 807 (1986). How *much* more limited is the power which federal courts may invoke is, of course, one of the central issues in the instant litigation.

The Tax Commission has – quite competently – identified and cited to every conceivable statement which may be favorable to it by Justice Cardozo, writing for this Court in *Gully v. First National Bank*, 299 U.S. 109 (1936). *See* Petition for Certiorari at 6-8; Brief of Petitioner at 7. In so doing, it essentially attempts to establish seven propositions: *first*, that in order to be a removable federal question, the suit must be, in "nature," *created by* federal law; *second*, that the federal question must be disclosed

on the face of the complaint, and that reference to the removal petition for any purpose is always unwarranted; *third*, that the "source" of the authority to bring the suit is always wholly irrelevant; *fourth*, that regardless of the surrounding legal reality, plaintiff remains master of the claim so long as "no claim within the . . . original pleading . . . is founded upon the Constitution, treaties, or laws of the United States," Brief for Petitioner at 6; *fifth*, that as long as the plaintiff will still have to prove some element(s) of the state cause of action, no federal question jurisdiction obtains, *see* Brief for Petitioner at 7; *sixth*, that the federal dispute herein is "so conjectural, and so far removed from plain necessity, that it is unavailing to extinguish the jurisdiction of the State Court," Petition for Certiorari at 7; *see also Gully*, 299 U.S. at 117; and *seventh*, that a case may not be removed based on "a federal defense, including the defense of [presumably 'ordinary,' *Pilot Life*-style] pre-emption." Brief for Petitioner at 8. *Amicus* believes that only the last of these propositions accurately reflects this Court's current approach to the issue, or, in the case of the sixth proposition, the legal reality of the instant case.

Even prior to *Gully*, this Court recognized that the "master of the forum" doctrine was not absolute; in *Great Northern Ry. v. Alexander*, 246 U.S. 276, 282 (1918), it qualified the doctrine by stating that "in the absence of a fraudulent purpose to defeat removal . . . [4] whether such a case . . . shall . . . become removable depends . . . solely on the form which the plaintiff by his voluntary action shall give to the pleadings."

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[4] *Amicus* should quickly add that neither it nor (in its understanding) Respondent suggests any fraudulent purpose on the part of the Tax Commission; it does submit, however, that the circumstances and nature of the filing of the complaint give rise to a probable inference of proscribed "artful pleading." *See infra* at 11 n.8. The citation adduced above is presented solely for illustration of the historically non-absolute nature of the "well pleaded complaint" rule.

While Justice Cardozo's opinion in *Gully* undoubtedly provides fodder to proponents of an absolutist approach, it also furnishes ample support for the more realistic approach which has taken hold in subsequent caselaw. In the selfsame case, he wrote that

> the *probable course of the trial*, the *real substance of the controversy*, has taken on a new significance. 'A suit to enforce a right which takes its *origin* in the laws of the United States is not necessarily, or for that reason *alone*, one arising under those laws . . . *unless* it *really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.*' *Shulthis v. McDougal*, 225 U.S. 561, 569.

Gully, 299 U.S. at 113-14 (emphasis added). Recognizing the need to preserve flexibility in federal question analysis, he concluded:

> What is needed is something of that *common sense accommodation of judgment* to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the *substantial causes* out of the web and lays the other ones aside . . . . To set bounds to the pursuit, the courts have formulated the *distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible.*

Id. at 117-18 (emphasis added) (citations omitted).

The continued and necessary flexibility of approach to the federal question conundrum has been reaffirmed with unwavering consistency in this Court's contemporary caselaw. In 1983, Justice Brennan, writing for a unanimous Court, stated:

> Since the first version of §1331 was enacted . . . the statutory phrase 'arising under the Constitution, laws, or treaties of the United States' has resisted all attempts to frame a single, precise definition for determining all cases which fall within . . . . Especially when considered in light of §1441's removal jurisdiction, the phrase 'arising under' masks a welter of issues regarding the interrelation of state authority and the proper management of the federal judicial system.

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983). In that case, Justice Brennan commented further that Justice Holmes' statement that "[a] suit arises under the law that *creates* the cause of action," *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (emphasis added), has been rejected by even its most ardent proponent as an exclusionary principle, *Franchise Tax Board*, 463 U.S. at 9, and was more appropriately characterized as a "quick rule of thumb." *Id.* at 11; *see also Merrell Dow*, 478 U.S. at 808-09 & n.5 (1986). Recognizing that "[r]emoval is but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law,' " *Avco Corp. v. Aero Lodge*, 390 U.S. 557, 560 (1968), this Court has interpreted §1441(b) "with an eye to practicality and necessity." *Franchise Tax Board*, 463 U.S. at 20. It observed in *Merrell Dow*, 478 U.S. at 810:

> We have constantly emphasized that, in exploring the outer reaches of §1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. 'If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject such statutes as a wooden set of self-sufficient words . . . .'

The current – and correct – approach is clearly multidimensional. Rather than adhering to Justice Holmes' rigidly confining approach, recent cases – *interpreting and citing Gully* – have held it to mean that federal question jurisdiction exists "when a federal question is *presented* on the face of the plaintiff's properly pleaded complaint," *Caterpillar, Inc. v. Williams*, ___ U.S. ___, 107 S.Ct. 2425, 2429 (1987) (emphasis added), or "when the plaintiff's properly pleaded complaint *raises* issues of federal law." *Metropolitan Life Ins. v. Taylor*, ___ U.S. ___, 107 S.Ct. 1542, 1546 (1987) (emphasis added). Both *Franchise Tax Board* and *Merrell Dow* expressly reaffirm *Gully's* implication that "[e]ven though state law creates [plaintiff's] causes

of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its *right to relief under the state law requires resolution of a substantial question of federal law in dispute between the parties.*" *Franchise Tax Board*, 463 U.S. at 13 (emphasis added); *see also id.* at 27-28; *Merrell Dow*, 478 U.S. at 806 n.2. Nothing in *Caterpillar* detracts from these conclusions.

Both *Avco* and *Taylor* found the "complete preemption" test to have been met. Interpreting *Avco* in *Franchise Tax Board*, this Court stated that "[t]he necessary ground for decision was that the pre-emptive force of § 301 [of the LMRA] is *so powerful* as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' " *Id.* at 23.[5]

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[5] In a critical footnote placed immediately at the end of the above-adduced quotation, this Court cited *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) – and Justice Rehnquist's concurring opinion therein – *id.* at 682, with approval:

> *To a similar effect* is *Oneida Indian Nation v. County of Oneida* . . . in which we held that – unlike all other ejectment suits in which plaintiff derives its claim from a federal grant . . . – an ejectment suit based on Indian title is within the . . . 'federal question' jurisdiction . . . because Indian title creates a federal possessory right to tribal lands 'wholly apart from the application of [normal] state law principles . . . .' *Cf.* 414 U.S., at 682-683 (Rehnquist, J., concurring).

Franchise Tax Board, 463 U.S. at 23 n.25. Justice Rehnquist's further observations in *Oneida* are also noteworthy here:

> The majority finds this strict rule [which would otherwise charaterize a tribal ejectment action as a state common law one] inapplicable to this case, and for good reason . . . . [T]he Government . . . has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of

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In *Taylor*,[6] this Court cited the *Franchise Tax Board* interpretation of *Avco* with approval, again reaffirming that where the preemptive force of federal law is "so powerful," any suit directly relating to the completely preempted area must be recharacterized as "purely a creature of federal law." *Taylor*, ___ U.S. at ___, 107 S.Ct. at 1546-47. *Amicus* will hereinafter urge that, in the fields of tribal sovereign immunity and state civil jurisdiction, the preemptive force of federal common law is so powerful that the state's purportedly state-law suit must be "recharacterized" as "purely a creature of federal law." So doing, it will maintain that, in these fields, congressional supervision has been exercised with such selectivity and care over two centuries, that the federal interest is at *least* equal to – and, in reality, *much greater than* – its interests in the LMRA and ERISA found sufficiently powerful to effectuate state court displacement in *Avco* and *Taylor*. At a *minimum*, *amicus* suggests, the Tax Commission's "right to relief under state law requires resolution of a substantial question of federal law," *Franchise*

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> Indians in their land . . . . Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also on the Federal Government's subsequent guarantee.

Oneida, 414 U.S. at 684 (Rehnquist, J., concurring) (emphasis in original). *Amicus* submits that the preceding rationale is equally applicable to the instant case, in that the federal government has exercised a subsequent and continuing supervision over both tribal sovereign immunity, and state civil jurisdiction over Indian country, which are the areas of law which it suggests create the "complete preemption" herein. In short, *Oneida*, a "mirror image" of this case for purposes of its "case arising" analysis, furnishes a pivotal key to the resolution of the instant dispute.

[6] *Amicus* believes that *Caterpillar* must be read *in pari materia* with *Taylor*, decided only two months before.

Tax Board, 463 U.S. at 13, sufficient to invoke complete preemption.[7]

C. The Tax Commission's Claims, Purportedly Based on State Law, are not only Preempted by Federal Law, but are Completely Displaced by it, to the Extent that the Tax Commission's State Court Claims must be Recharacterized as Necessarily Federal in Nature, Removable to Federal Court pursuant to 28 U.S.C. § 1441(b).

1. Since the field of *tribal sovereign immunity* is not only preempted by federal law, but is completely displaced by it, the Tax Commission's claims must be recharacterized as necessarily federal in nature.

The sovereign immunity issue here is not "doubtful, conjectural, [or] . . . far removed from plain necessity," *see Gully*, 299 U.S. at 117, and constitutes a "substantial cause" of the "real substance of" the litigation, *id.* at 118, 114, "and substantially involves a dispute or controversy respecting the validity, construction, or effect of such law, upon determination of which the result depends." *Id.* at 114. By itself, these factors may or may not be sufficient to warrant removal, but even pursuant to the *Avco/Taylor* "federal interest so dominant" test, that interest, pursuant to the trust responsibility, in only *selectively* abrogating tribal sovereign immunity, is "so powerful as to displace any state cause of action." *See Taylor*, ___ U.S. at ___, 107 S.Ct. at 1546.

In a general sense, of course, the primacy of federal law in the field of Indian affairs cannot be gainsaid. *See*

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[7] In order to sustain such a conclustion, this Court need not look beyond the complaint for information relating to the status of the parties, although it may, *see generally*, 14A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* 264-65 (2d ed. 1985) ("better rule"); 1A *Moore's Federal Practice Manual* 185-87 (2d ed. 1974), since the Chickasaw *Nation* is named in the caption as a party defendant; in short, the jurisdictional impact is apparent from the face of the complaint itself.

generally The Federalist No. 42, at 290 (J. Madison) (E. Bourne ed. 1937) (defects in Articles of Confederation approach to allocation of state and federal power regarding Indians); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (early establishment of federal supremacy); *United States v. Celestine*, 215 U.S. 278, 290 (1909) ("it is for congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress."); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976) (summary of earlier holdings); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (reaffirming that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."); *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okla. 1942) (Oklahoma Supreme Court recognizing federal plenary power over Indians as "[f]ull; entire; complete; absolute; perfect; unqualified"). But *amicus* does not understand Respondents' position to necessarily maintain that the *entire field* of Indian law is *completely* preempted within the meaning of *Avco* and *Taylor* although, as a general matter, both federal common law and statutes preempt state law within the meaning of *Pilot Life Ins. Co. v. Dedeaux*, ___ U.S. ___, 107 S.Ct. 1549 (1987). In short, it is unnecessary to the resolution of this case to decide that every issue touching and concerning the field of Indian law is completely preempted, since this case involves a unique attempt by a state to impose its sovereignty – and the civil jurisdiction of its courts – on an unconsenting federally recognized tribe.

Pursuant to its trust responsibility, Congress has taken the field of tribal sovereign immunity completely in hand. Perhaps especially in the context of the Five Civilized Tribes, it has demonstrated that it not only knows how to abrogate tribal sovereign immunity when it wants to, *see, e.g.*, Act of June 28, 1898, § 2, 30 Stat. 495, held to be a *limited* abrogation of tribal sovereign immunity in *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908); Act of April 26, 1906, § 18, 34 Stat. 137, 144, held to be a *limited* abrogation of tribal sovereign immunity in *United States*

v. United States Fidelity & Guar. Co., 309 U.S. 506, 513 (1940); Public Law 93-195, § 2, 87 Stat. 769 (1973) (*limited* abrogation of tribal sovereign immunity), but also that, in the exercise of its trust responsibility, it would exercise that power with great selectivity and care. *See, e.g., Thebo v. Choctaw Tribe*, 66 F. 372, 373-74 (8th Cir. 1895); Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, tit. I, § 110, 88 Stat. 2213 (1975). "Congress alone must determine the extent to which the immunities and protetion afforded by tribal status are to be withdrawn." *Haile v. Saunooke*, 246 F.2d 293, 297-98 (4th Cir.), *cert. denied*, 355 U.S. 893 (1957); *see also id.*, cases cited therein; *see generally Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (tribes enjoy attributes of sovereignty unless divested by federal statute or treaty). The federal policies of tribal self-determination, economic development, and cultural autonomy require tribal sovereign immunity, *see, e.g., United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982), and only Congress may modify that judgment. *See generally Baker v. Carr*, 369 U.S. 186, 215-17 (1962) (political question implications of commitment of issue to coordinate political branch in context of congressional authority over Indian affairs); *Atkinson v. Haldane*, 569 P.2d 151, 161-62 (Alaska 1977) (political question doctrine applied to tribal sovereign immunity). This Court has recognized the inviolability of tribal sovereign immunity, absent abrogation, with an unwavering historical consistency. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986) (*Three Tribes II*) (*common law* tribal sovereign immunity necessary to tribal self-governance); *id.* at 891 (privileged from diminution by the states absent federal abrogation); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (same); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-73 (1977) ("settled" principle, applied even to tribal activities *outside* Indian country); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968) (Arizona Supreme Court, *in banc*, unanimously anticipating *Puyallup* holding); *see also supra*

at 2 n.2 (*Chemehuevi* litigation). Sovereign immunity, this Court's caselaw has taught, is not a doctrine "the application of which is in the discretion of the court." *People v. Quechan Tribe*, 595 F.2d 1153, 1155 (9th Cir. 1979). Nor is the doctrine's application affected by the fact that the state is the party plaintiff, *id.*, or that the suit involves a tribally-owned commercial enterprise. *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521-22 (5th Cir. 1966).

Standing against this unqualified avalanche of precedent is *Oklahoma ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985), decided three months before the instant litigation was brought in the Oklahoma state courts.[8]

In that case, the Oklahoma Supreme Court, in a decision both confusing sovereign immunity with tribal *jurisdiction*, and confusing a threshhold issue with the merits, denied tribal sovereign immunity based on an impressionistic and state-oriented balancing test. While that holding simply refused to follow this Court's categorical pronouncements in *U.S. Fidelity & Guar.*, *Santa Clara Pueblo*, and *Puyallup*, and is consequently and manifestly wrong, it does explain the Tax Commission's earnest desire to keep this case from the federal courts: if successful in its attempt to artfully plead a completely preempted cause of action, it is willing to gamble both that

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[8] *Amicus* suggests that one would need to be myopic indeed to not see this coincidence as at least circumstantial evidence of motivation for an attempt by the Tax Commission to "artfully plead" its complaint. In *Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981), Justice Rehnquist, writing for this Court, referred to the rule that "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum'" as a "settled principle" of law. *Id.* at 397 n.2 (citation omitted); *see also Clorox Co. v. District Court*, 779 F.2d 517, 521 (9th Cir. 1985); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 249 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982); 14A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* 266-73 (2d ed. 1985).

the Oklahoma Supreme Court will not reverse its erroneous holding in *May*, and that this Court will not grant subsequent review. *May* cannot, however, detract from the overwhelming preemptive force of federal law in the field of tribal sovereign immunity, and is, in fact, so radically wrong that further proceedings in that case were enjoined in federal court, *Younger v. Harris*, 401 U.S. 37 (1971), notwithstanding. *See* Respondents' Brief in Opposition to Petition for Certiorari, App. at 33-55.

2. Since the field of *state civil jurisdiction* over Indian activities in Indian country is not only preempted by federal law, but is completely displaced by it, the Tax Commission's claims must be recharacterized as necessarily federal in nature.

Historically, Indian activities within Indian country were generally considered beyond both the legislative and judicial jurisdiction of the states, unless Congress specifically provided otherwise. *See, e.g., Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 142 (1984) (*Three Tribes I*); *Williams v. Lee*, 358 U.S. 217, 222 (1959); United States Dep't of Interior, *Federal Indian Law* 363 (1968). In this area of tribal-state relations, no less than in the context of tribal sovereign immunity, Congress has, pursuant to its trust responsibility, exercised continuing and meticulous supervision.

Both specific and general statutes relating to criminal jurisdiction are too numerous to mention. In the civil context, relevant here, recent congressional enactments have dealt, *inter alia*, with the New York Indians, Act of Sept. 30, 1950, ch. 947, § 1, 64 Stat. 845 (codified at 25 U.S.C. § 233); terminated federal recognition of some tribes, *see Bryan v. Itasca County*, 426 U.S. 373, 389 n.15 (1976) (citing statutes); enacted § 4 of Public Law 280 (state civil jurisdiction); and required tribal consent to state assumptions of civil jurisdiction, Pub. L. 90-284, tit. IV, § 402, 82 Stat. 79 (1968). Amicus urges that these activities by Congress – to a degree at least as extensive

as its regulation of Indian lands – evidence both exhaustive supervision and a "continuing solicitude" (with narrow exceptions) for the rights of tribes and tribal members to be free from state civil jurisdiction regarding their activities in Indian country. *See supra* at 14 n.5 (citing *Oneida*, 414 U.S. at 682) (Rehnquist, J., concurring).

The Tax Commission misapprehends the total focus of Public Law 280, citing out of context, *see* Brief of Petitioner at 32, *Cabazon Band's* observation that Congress' primary concern in enacting that law was in its criminal jurisdictional aspects. It neglected to note this Court's immediately preceding sentences, see 480 U.S. at 207-08, which, citing to *Bryan*, 426 U.S. at 385,[9] noted the limited and specific nature of § 4 of that Act, which related to the *civil* jurisdiction question relevant herein. Public Law 280 was the result of "comprehensive and detailed congressional scrutiny," *Kennerly v. District Court*, 400 U.S. 423, 424 n.1, 427 (1971), *"and was intended to replace the ad hoc regulation of state jurisdiction over Indian Country with general legislation . . . ."* *Three Tribes II*, 476 U.S. at 884. Public Law 280 was, of course, given preemptive effect in *Kennerly*, 400 U.S. at 426-27, where this Court held that the methodology therein provided for acquiring state civil jurisdiction over Indian activities in Indian country was exclusive. The 1968 amendments to Public Law 280 are equally preemptive, since Congress was there "motivated by a desire to shield the Indians from unwanted extensions of jurisdiction over them . . . ." *Three Tribes II*, 476 U.S. at 886. The overwhelming dominance of the federal interest in this area, too, is now "well settled."

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[9] *Bryan* also took note of the termination Acts, which it characterized as "cogent proof that Congress knew how to express its intent directly. . . ." *Bryan*, 426 U.S. at 389. Its observation concerning the preemptive effect of those Acts is equally apposite here.

3. It is not necessary that the federal cause of action necessarily relied upon by the plaintiff provide plaintiff with a remedy in order for a case to be removable to federal court pursuant to the "complete preemption" doctrine.

Early on, courts dealing with the privileges and immunities of federally recognized tribes noted that the absence of otherwise-available remedies was a legal fact of federal Indian law, necessary to the preservation of tribal sovereignty and, as regulated by Congress, to the effectuation of the federal trust responsibility. *See, e.g., Adams v. Murphy*, 165 F. 304, 309 (8th Cir. 1908) (absence of a "plain, speedy, or adequate remedy" denied by "considerations of sound public policy"). Modern case-law has, wholly apart from the context of Indian law, supported the proposition that the absence of ability to prevail on a federal remedy in federal court is not a bar to a finding of "complete preemption."

In *Avco*, 390 U.S. 557, this Court noted that "the breadth or narrowness of the relief which may be granted under federal law in § 301 cases *is a distinct question* from whether the court has jurisdiction over the parties and the subject matter. *Id.* at 561 (emphasis added). In *Caterpillar*, ___ U.S. ___, 107 S.Ct. 2425 (1987), it stated that "[t]he Court of Appeals also appears to have held that a case may not be removed to federal court on the ground that it is completely preempted unless the federal cause of action relied upon provides the plaintiff with a remedy. . . . This decision is squarely contradicted by our decision in *Avco*." *Id.* at 2429 n.4. *Amicus* suggests that this issue, too, is now "well settled."

D. Alternatively, Since Tribal Sovereign Immunity is Jurisdictional, and since Judgments Absent Subject Matter Jurisdiction are Void Even Absent Appearance by Defendant, Tribal Sovereign Immunity Cannot Properly be Characterized as a Defense.

In *Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315 (10th Cir. 1982), the Tenth Circuit stated that "sovereign

immunity must stand unless it *affirmatively appears* that there has been a congressional or tribal waiver of immunity." *Id.* at 318; *see also U.S. Fidelity & Guar.*, 309 U.S. at 514. This conclusion is correct for several reasons. Tribal sovereign immunity is jurisdictional. *Id; see also Quechan Tribe*, 595 F.2d at 1154 & n.1. Since this Court has held that any judgment against a tribal sovereign possessing immunity is "void in the absence of congressional authorization," *Puyallup*, 433 U.S. at 172 n.10, and since the burden of pleading follows the burden of proof, tribal sovereign immunity cannot properly be characterized as a defense. The Tax Commission's complaint, which alleged no right to sue a sovereign, was consequently not a "well pleaded" one, since, in the unique context of a suit by a state against a federally recognized tribe regarding its activities in Indian country, and in a non-Public Law 280 state, a state district court essentially sits as a court of *limited*, not general original jurisdiction. Clearly, Oklahoma could not grant civil jurisdiction to itself in the instant case.

II. THE TENTH CIRCUIT DECISION BELOW CORRECTLY AFFIRMED DISMISSAL OF THE STATE'S STATE COURT COMPLAINT AGAINST THE FEDERALLY RECOGNIZED CHICKASAW NATION.

A. The Tax Commission's Assertion that Tribal Sovereignty has been Abolished in Oklahoma, and that State Law Applies, part and parcel, to All Indian Country Therein, is at Variance with Congressionally and Presidentally-declared Policy, Every Federal Decision which has Addressed the Issue, and with Current Decisions of both the Oklahoma Supreme Court and the Oklahoma Court of Appeals.

Respondent Tax Commission has devoted eighty percent of the substance of its Brief-in-Chief to attempting to establish that all tribal sovereignty has been disestablished in Oklahoma, that "reservations" continue to be defined as they were one hundred years ago, and that state law applies, presumably part and parcel, to all Indian country in the state. Brief of Petitioner at 12-39. In so doing – and, as is otherwise apparent from the hostile

tone of its Brief-in-Chief in general, *see supra* at 2-3 – it recalls to mind the "deadliest enemies" allusion of this Court in *United States v. Kagama*, 118 U.S. 375, 384 (1886).[10] In maintaining its remarkable position, the Tax Commission seeks from this Court what it has been unable to secure from Congress: *de facto* tribal termination, and relegation of their status to that of "private, voluntary organizations." See *United States v. Mazurie*, 419 U.S. 544, 557 (1975). But tribal sovereignty has not been extinguished by Congress, and "reservations," for jurisdictional purposes, are now defined by reference to the "Indian country" approach of 18 U.S.C. § 1151.

The evolution of "reservation" analysis in this Court was reflected early in this century in *United States v. Pelican*, 232 U.S. 442 (1914). In that case, it articulated a standard focusing on whether land "had been validly set apart for the use of the Indians as such, under the superintendance of the Government." *Id.* at 449. The jurisdictional implications of the modern "reservation" approach had been recognized even earlier. *See United States v. Celestine*, 215 U.S. 278, 285 (1909). In *United States v. McGowan*, 302 U.S. 535 (1938), this Court held that the "Reno Indian Colony," consisting of 28.38 acres, which had been *purchased with federal funds*, was, despite both

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[10] *Amicus* hastens to add that this posture, even within Oklahoma, is apparently and hopefully *sui generis* to the Tax Commission, since the Governor of Oklahoma has recently promulgated a statement calling for increased tribal/state cooperation, the Oklahoma Legislature in its latest session passed three statutes to the same effect, *see, e.g.*, Okla. Stat. Ann. tit. 74, §1221 (West Supp. 1989) (Oklahoma recognizing "unique status" of federally-recognized tribes); Okla. Stat. Ann. tit. 74, §1222 (West Supp. 1989) (tribal government/state government relations), and both the Oklahoma Supreme Court (while manifestly misguided in its approach to tribal sovereign immunity, *see supra* at 19-20) and the Oklahoma Court of Criminal Appeals have acknowledged the presence of jurisdictionally-congnizable Indian country in the state.

that fact and its designation as a "colony," a "reservation" for jurisdictional purposes.

In 1948, Congress enacted 18 U.S.C. § 1151. While its "Indian country" definition is facially limited to the criminal jurisdictional context, this Court has long held "that it generally applies as well to questions of civil jurisdiction." *De Coteau*, 420 U.S. at 427 n.2 (citing cases). In 1978, this Court, citing *Celestine*, *Pelican*, and *McGowan*, applied § 1151 as the jurisdictional touchstone in modern Indian law. *United States v. John*, 437 U.S. 634, 648-49 (1978). This approach has persisted to the present date. *Cabazon Band*, 480 U.S. at 207 n.5.

"Only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Respondent Choctaw Nation – and the other Civilized Tribes – have treaty rights and guarantees which remain the supreme law of the land, *see Missouri v. Holland*, 252 U.S. 416 (1920), unless repudiated by subsequent congressional action, *see The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871), and "[d]iminishment . . . will not lightly be inferred." *Solem*, 465 U.S. at 470. In short, treaty rights still obtain absent Congressional repudiation, and the Tax Commission's record in this case for establishing the absence of a single parcel of jurisdictionally cognizable "Indian country" in Oklahoma is as inadequate as can be imagined. At a *minimum*, the Chickasaw Nation enjoys a "diminished" "reservation" for jurisdictional purposes herein.

Ignoring *Ex Parte Webb*, 225 U.S. 663, 682-83 (1912) (§ 1 of Oklahoma Enabling Act negates any Congressional purpose to repeal by implication existing federal laws), and *United States v. Ramsey*, 271 U.S. 467 (1926) (continued existence of, and federal authority over, "Indian country" in Oklahoma), the Tax Commission mis-cites to *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), omitting the last clauses of an important sentence, *and* a critical footnote placed thereafter. *Compare* Brief of Petitioner at 11-12 *with Oklahoma Tax Comm'n*, 319 U.S. at 603 & n.5. In that footnote, this Court took cognizance of the potential effect of the Oklahoma Indian Welfare Act, 49

Stat. 1967 (1936) (codified in 25 U.S.C. §§ 501-509), passed only seven years before, on the further pursuit of assimilationist policies in Oklahoma. As this Court noted in *Bryan*, 426 U.S. at 389 n.14 [citing *Santa Rosa Band v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975)], "courts 'are not obliged in ambiguous instances to strain to implement [an] assimilationist policy Congress has now rejected, particularly where to do so will interfere with the present congressional[11] approach to what is, after all, an ongoing relationship.' " Moreover, the footnote in *Oklahoma Tax Comm'n*, 319 U.S. at 603 n.5, further cites to F. Cohen, *Handbook of Federal Indian Law* (1942), which indicates the criteria for continued tribal cohesion, *id.* at 131 and, in Cohen's final section, takes note of the provisions of the Oklahoma Indian Welfare Act. *Id.* at 455. The correlation between the two is apparent. Moreover, *Oklahoma Tax Comm'n* must be read *in pari materia* with *Board of Comm'rs v. Seber*, 318 U.S. 705 (1943), decided less than two months before, which presents a picture of Oklahoma Indian sovereignty substantially at variance with that offered by the Tax Commission. *Id.* at 718. Finally, it is interesting to note that *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 165 n.1 (1973), cites *Oklahoma Tax Comm'n* as a "reservation Indians" case.

Nor may Oklahoma be "singled out" from other non-Public Law 280 states on other grounds. § 1151 "resolved existing doubts in favor of federal jurisdiction, and its general thrust is to establish a uniform rule." F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 779 n.86. The governments of the Five Civilized Tribes were specifically continued by Congress in 1906. Act of April 26, 1906, 34

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[11] *Amicus* notes that the current federal policy promoting tribal sovereigny and opposing assimilationist policy is not limited to the legislative branch. *See* Statement of President Reagan on Indian Policy, 19 Weekly Comp. Pres. Doc. (Jan. 24, 1983) 96, 99; Message of President Nixon to the Senate Relating to the American Indians, 116 Cong. Rec. S23,258 (July 8, 1970).

Stat. 137; *see also Morris v. Watt*, 640 F.2d 404 (D.C. Cir. 1981); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). That Indian country exists in Oklahoma is evidenced, in addition to this Court's decisions adduced above, by *Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Comm'n v. Muscogee (Creek) Nation*, ___ U.S. ___, 108 S. Ct. 2870 (1988); *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *State v. Burnett*, 671 P.2d 1165 (Okla. Crim. 1983); and *Ahboah v. Housing Auth.*, 660 P.2d 625 (Okla. 1983); *see generally May*, 711 P.2d at 81 [withdrawing in part *Ex parte Nowabbi*, 60 Okla. Crim. 111, 61 P.2d 1139 (1936)]. The existence of Indian country does not depend on the manner in which the land at issue was acquired, *see, e.g., State v. Youngbear*, 229 N.W. 2d 728, 732 (Iowa), *cert. denied* 423 U.S. 1018 (1975) (citing *McGowan*, 302 U.S. 535), nor is the size of the "reservation" relevant to its "Indian country" status. *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985). The Tax Commission's out-of-context citation to *Oklahoma Tax Comm'n* is unavailing, as is its reference to the "legislative history" of the Oklahoma Indian Welfare Act, *see* Brief of Petitioner at 25, which, it turns out, is a 1935 Senate report on a bill which was later substantially amended prior to enactment, the earlier version having been found to contain a number of "objectionable provisions." *See* H.R. Rep. No. 2408, 74th Cong., 2d Sess. (1936) at 3. The latter report, it may be noted, concluded that the "sovereignty" provisions of the Act "permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act. . . ." *Id.* Recent congressional policy is in accord with the above conclusions. *See, e.g.*, Indian Gaming Regulatory Act, §§ 2(4), 4(4)(B), 20 (a)(2)(A), ___ Stat. ___, 134 Cong. Rec. S12,657 (daily ed. Sept. 15, 1988).

B. The Tax Commission's Equally Stunning Assertion that "Insofar as § 1151 operates to directly displace the State's ability to administer its tax laws evenly upon all citizens, it is not within the authority granted Congress by the Commerce Clause" is Without Merit.

The Tax Commission's invocation of *National League of Cities v. Usery*, 426 U.S. 833 (1976), Brief of Petitioner at 31, is unavailing. Whether or not this Court should choose to breathe new life into *Usery*, *see, e.g., South Carolina v. Baker*, ___ U.S. _ _, 108 S. Ct. 1355 (1988), the plenary nature of federal power over Indian tribes has been recognized from the beginning. *See* The Federalist No. 42, at 290 (J. Madison) (E. Bourne ed. 1937); *see also supra* at 16-17. In any case, this issue may not even properly be before this Court. *See* 28 U.S.C. § 2403; Sup. Ct. R. 28.4(b).

C. The Law in Effect prior to June 19, 1986 Mandated Dismissal of Removed Actions where the State court Lacked Jurisdiction over the Claim.

"If the state court lacks jurisdiction over the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922). The 1986 amendment to 28 U.S.C. § 1441, in which § 1441(e) was added, Pub. L. 94-583, § 6, 90 Stat. 2898 (1986), occurred after filing and removal in the instant case. J.A. 1, 2.

D. Oklahoma Courts Lack Jurisdiction over an Action Against a Federally Recognized Indian Tribe Regarding its Activities Within Indian Country.

Oklahoma courts lack subject matter jurisdiction over the instant controversy for the reasons adduced *supra* at 20-21. In addition, they likely lack *in personam* jurisdiction as well. *See, e.g., Francisco v. State*, 113 Ariz. 427, 556 P.2d

1, 4 (1976); F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 349-50.

CONCLUSION

That the standard for determining the extent of the federal courts' "case arising" jurisdiction is a multi-dimensional one is now, indeed, "well settled." Well settled, too, is the overwhelming nature of the federal interest in regulating – unencumbered by inconsistant state court adjudications – both the sovereign immunity of the federally recognized tribes, and the extent of state civil jurisdiction in Indian country.

Concerning the existence of tribal sovereignty and Indian country in Oklahoma, the Tax Commission's analysis is manifestly misguided. Its assertion that allotment was a federal *duty* given *tribal* breaches of *their* trust responsibility, Brief of Petitioner at 16, is, to say the least, a novel interpretation of that trust responsibility, *see, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) ("guardian-ward" relationship), and, to say a bit more, a "cruel joke." *See, e.g., United States v. John*, 437 U.S. at 653. Even the Tax Commission concedes that

> [a]lthough white settlement was illegal, the federal government did nothing to stop it. . . .Also, white settlers were not happy with their inability to exercise political control over the Territory to mold the environment to their liking. As the white population continually grew, so did the demand to abolish the reservations so that land could pass freely into white hands. . . .

Brief of Petitioner at 14; *see also id.* at 23 ("federal government made no effort to enforce the agreements on its part . . . "); *see generally* J. Malone, *The Chickasaw Nation* 438-446 (1922) (circumstances surrounding allotment involving fraud and corruption); A. Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes passim* (1972) (same). Far from being an exercise in "statesmanship," Brief of Petitioner at 38, the Dawes Commission's activities resulted in an "orgy of plunder and exploitation probably unparalleled in American history." *Id.* at 91; *see*

also Harjo, 420 F. Supp. at 1121, 1130-36 (circumstances surrounding allotment in Oklahoma); *see generally United States v. Sioux Nation*, 448 U.S. 371, 376-78 (1980) (familiar forces at work regarding Sioux Nation); *John*, 437 U.S. at 643 n.11 (earlier frauds against Choctaws). Unless the tribes' treaty guarantees concerning their sovereignty and lands have been specifically negated by Congress, taking into consideration, of course, the "canons of construction", *see, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980), such guarantees persist. In any case, residual doubts concerning the status of the land in question here have now been laid to rest by this court's interpretations of 18 U.S.C. § 1151.

Ordinarily, of course, it cannot be presumed "that state courts will not follow both the letter and the spirit of [this court's] decisions in the future." *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 (1982). In the instant case, however, no such presumption need be invoked, since *May*, 711 P.2d. at 84, speaks for itself. *See generally Georgia v. Rachel*, 384 U.S. 780, 803-04 (1966) (analogy to civil rights removal, where denial of a federally guaranteed immunity from prosecution, also analogous here, would "certainly" not be enforced). In short, it is the Tax Commission's perennial[12] insistence on judicial abrogation of Oklahoma tribal sovereignty, not that tribal sovereignty itself, which should be "extinguished" by this Court in the instant case.

Respectfully submitted,

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December 17, 1988

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[12] *See, e.g., Indian Country, U.S.A.*, 829 F.2d at 975 n.3.

No. 88-266

In The
Supreme Court of the United States
October Term, 1988

OKLAHOMA TAX COMMISSION,

Petitioner,

vs.

JAN GRAHAM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE SAC AND FOX NATION, KAW TRIBE OF OKLAHOMA, DELAWARE TRIBE OF WESTERN OKLAHOMA, CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, TONKAWA TRIBE OF OKLAHOMA, ABSENTEE-SHAWNEE TRIBE OF OKLAHOMA, and KICKAPOO TRIBE OF OKLAHOMA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Sac and Fox Nation, and the Kaw, Delaware (Western), Cheyenne-Arapaho, Tonkawa, Absentee-Shawnee, and Kickapoo Tribes of Oklahoma are federally recognized Indian tribes located in the former Oklahoma Territory portion of the State of Oklahoma (the Anadarko Area Office jurisdiction in western Oklahoma). Several of these Tribes are organized pursuant to Constitutions and Charters adopted pursuant to the Act of June 26, 1936, 49 Stat. 1967 (25 U.S.C. § 503).[1] The Kaw Tribe of Oklahoma maintains its ancient traditional government as modified by its own tribal law where experience has shown necessary, and is similar in that respect to the Navajo Nation in that it is not organized pursuant to any federal statute. The Sac and Fox Nation, and the Kickapoo, Absentee-Shawnee, and Cheyenne-Arapaho Tribes maintain tribal courts supported by Bureau of Indian Affairs grants and contracts, tribal tax revenues, and tribal funds. The Kaw, Delaware, and Tonkawa Tribe exercise their judicial powers within the Court of Indian Offenses administered by the Anadarko Area Office of the Bureau of Indian Affairs, 25 C.F.R. § 11.1 (1987).

Pursuant to these fundamental foundations, these Indian tribes have enacted, and enforce, a myriad of statutes which regulate the conduct of all persons within the Indian country subject to the jurisdiction of their tribe.

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[1]Selected portions of the Constitution and Federal Charter of the Sac and Fox Nation are reproduced in Appendix I and Appendix II respectively for the edification of the Court.

Some of the laws enacted by one or more of these tribes include provisions authorizing the incorporation of business and non-profit corporations, removal or discipline of elected tribal officials, the regulation of the gaming industry, regulation of the mineral mining industry including oil and gas mining, regulating security agreements and the filing and enforcement of liens, provisions for the levy and collection of tribal taxes, regulation of certain industries, provisions providing for public health facilities and public housing, provisions defining the punishment for criminal offenses and providing for police and fire protection, as well as provisions for complete trial and appellate court systems with what is believed to be model tribal laws relating to civil, criminal, appellate, and juvenile procedure, and rules of evidence. Interpreters are provided in the tribal courts when needed.

In addition to these statutory enactments, the courts of these tribes enforce tribal traditions and customs as the common law of the affected tribe in a manner similar to that in which American customs and traditions are enforced as the common law in state and federal courts. Actions relating to marriage, divorce, child custody, guardianships, probate of estates, contract rights, tortious conduct, and requests for relief in equity are not uncommon.

These laws are enforced within the Indian country of each tribe. This consists, at a minimum, of the trust or restricted allotments and lands owned by the tribe reserved from allotment or acquired and set aside in trust by the United States or restricted against alienation by the United States pursuant to an Act of Congress, 25 U.S.C. §§ 177, 335, 465, 501. Some tribes maintain the posi-

tion that their original reservation boundaries were not disestablished, or that at worst, their reservation was diminished but not disestablished in the allotment process. This question has not yet been authoritatively determined under the modern definition of Indian country or the modern test for reservation disestablishment or diminishment adopted by this Court in response to the enactment of 18 U.S.C. § 1151.

The Tribes have a direct interest in the outcome of this action insofar as the Oklahoma Tax Commission requests this Court to render a sweeping decision judicially abolishing federally recognized tribal governments and Indian country without Congressional sanction.

SUMMARY OF ARGUMENT

The Tenth Circuit properly decided in this action that the original suit by the Oklahoma Tax Commission was removable, and that sovereign immunity barred the suit in the first instance. Given the *per se* rule adopted by this Court that States cannot tax Indian Tribes without clear and unambiguous Congressional consent, and the settled law that an Indian Tribe cannot be sued without its express consent or the unambiguous consent of Congress, this is clearly a case where the Oklahoma Tax Commission's original complaint was required to allege both Congressional consent to levy the taxes claimed from the Chickasaw Nation, and consent for the Chickasaw Nation to be sued. Both of these allegations are necessary, both raise federal questions, and the failure to make these alle-

gations does not take this action outside the complete pre-emption doctrine announced in *Caterpillar, Inc. v. Williams,* 107 S.Ct. 2425, 2430 (1987) and *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 675 (1974).

The Oklahoma Tax Commission's brief in this action is replete with generalizations and unsupported argument constituting an attempt to resurrect a legal dinosaur—the mythological "Oklahoma Indian." The myth of the "Oklahoma Indian" has been laid to rest in the federal courts in recent years by critical examination of the specific treaties and statutes applicable to the various Indian Tribes now in Oklahoma—over thirty in number[2]—on a Tribe by Tribe basis, rather than reliance upon platonic notions of the discredited assimilation theory and paternalistic attitudes.

Simply stated, most of the general laws enacted by Congress in the period between 1899 and 1910 dealing specifically with Indian Tribes in Oklahoma apply by their terms only to the Cherokee, Creek, Seminole, Choctaw, and Chickasaw Nations or Tribes, and have no effect whatsoever upon the other twenty-five plus Tribes resident within Oklahoma. These Tribes, bands, and Nations—when their

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[2]Cohen, Handbook Of Federal Indian Law 770 (1982 Ed.) (Michie Bobbs-Merrill, Publisher) quoting Pipestem, *The Journey from Ex Parte Crow Dog to Littlechief: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma* 6 Amer. Indian L. Rev. 1, 3-4 (1978). *See,* also, Pipestem & Rice, *The Mythology of the Oklahoma Indians: A Survey of the Legal Status of Indian Tribes in Oklahoma* 6 Amer. Indian L. Rev. 259 (1978); Work, *The "Terminated" Five Tribes of Oklahoma: The Effect of Federal Legislation and Administrative Treatment on the Government of the Seminole Nation* 6 Amer. Indian L. Rev. 8 (1978). The 1982 edition of Cohen's Handbook contains a summary of the legal status of Indian Tribes in Oklahoma.

treaties and the Acts of Congress which relate to them are analyzed on a case by case basis—retain generally the full cornucopia of legal powers and immunities they enpoyed prior to the creation of Oklahoma Territory and the State of Oklahoma.

—o—

ARGUMENT

I. THIS ACTION WAS PROPERLY REMOVED AND DISMISSED

> [I]f a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law. *Caterpillar Inc. v. Williams,* 107 S.Ct. 2425, 2430 (1987), quoting *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 463 U.S. 1, 24 (1983).

In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule. *California v. Cabazon Band of Mission Indians,* 107 S.Ct. 1083 (1987).

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear. *Montana v. Blackfeet Tribe,* 471 U.S. 759, 765 (1985).

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congres-

> sional authorization," the "Indian Nations are exempt from suit." It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed". *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted).
>
> [I]n no case shall suit be instituted against the tribal government without its consent. Chickasaw Allotment Agreement ratified at § 29, Act of June 28, 1898, 30 Stat. 495.

It is beyond cavil that the Indian Tribes in Oklahoma, including the Chickasaw Nation, are immune from suit absent express authorization from Congress or the tribal government. This Court has repeatedly confirmed the sovereign immunity of Indian Tribes, bands, and Nations, and this is the settled law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165 (1977) (recognizing tribal immunity for off-reservation fishing activities); *Turner v. United States*, 248 U.S. 354 (1919) (a special Congressional Act was required to authorize a lawsuit against the Creek Nation in the State of Oklahoma). The case law from the federal district and circuit courts of appeal holding Indian Tribes immune from suit absent tribal or congressional consent is legion. *See, Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957); *Maryland Casualty Company v. National Bank*, 361 F.2d 517 (5th Cir. 1966); *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895); *Boe v. Fort Belknap Indian Community*, 642 F.2d 276 (9th Cir. 1981); *Cherokee Nation v. State*, 461 F.2d 674 (10th Cir. 1972); *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 314 (10th Cir. 1982), and their progenitors and progeny.

Perhaps most instructive in the present case is *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), quoted in *Santa Clara Pueblo v. Martinez*, supra, in which this Court specifically held the Chickasaw Nation in Oklahoma immune from suit by reason of sovereign immunity. This Court further recognized that such immunity would prevail even if the tribal government had been extinguished, while recognizing in footnote 8 at 309 U.S. 512 that Congress had unequivocally continued the tribal government of the Chickasaw Nation indefinitely by the Section 28 of the Act of April 26, 1906, 34 Stat. 148. Where is the Congressional act which authorizes the present suit against the Chickasaw Nation? Simply stated, none exists.

In *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987), this Court recognized that the federal law imposed a *per se* rule prohibiting state taxation of Indian Tribes absent the express consent of Congress. Contrary to the Oklahoma Tax Commission's position, the normal rules in tax cases do not apply when Indians or Indian property are involved. Specifically, the Constitution vests the Federal Government with exclusive authority over relations with Indian Tribes, Indian tribes and individuals generally are exempt from state taxation within their own territory, States may tax Indians only when Congress has manifested clearly its consent to such taxation, and statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764, 766 (1985) (citations omitted).

Congress expressly reserved, in Section 1 of the Oklahoma Organic Act of May 2, 1890, 26 Stat. 81, and again

in Section 1 of the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, its complete and exclusive authority over the persons, property and other rights of Indians "by treaties, agreement, law or otherwise." Pursuant to these acts, Article 10, § 6 of the Oklahoma Constitution exempts from state taxation:

> such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws

and Article 1, § 3 thereof states in pertinent part:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

The intent of the Oklahoma Organic Act with respect to the Indian tribes, and therefore that of the Oklahoma Enabling Act which contains substantially similar language, is illustrated by an exchange between Congressmen Mansur and Turner during the floor debates. The purpose of the Oklahoma government vis-a-vis the Indian tribes and their territory was explained as follows:

> MR. MANSUR: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?
>
> MR. TURNER: But I suggest to the gentleman that this is no longer a reservation, but a Territory.

> MR. MANSUR: But I desire to remind the gentleman that, as this bill expressly declares, *this Territorial government or organization is not for any Indian reservation whatever; it does not apply to Indian reservations.*

51 Cong. Rec. 2104 (1890) (remarks of Messrs. Mansur and Turner) (emphasis added). Perhaps in part because the allotment agreements were then being negotiated, Congressman Mansur emphasized that the Indian tribes and their reservations were to be unaffected by the creation of Oklahoma:

> I challenge any gentleman on this floor—I care not who he is—to take any one of the first twenty-four sections of this bill [the Sections relating to Oklahoma Territory] and show where it touches a red man at all. I repeat, for I would like to have it understood, that the first twenty-four sections of this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first twenty-four sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation. . . .
>
> Now, as to every Indian reservation within the whole limits of the Indian territory as now organized, we say expressly that those first twenty-four sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that as to every Indian tribe and as to the land of every Indian tribe, none of these twenty-four sections which apply to the white people shall operate.

Id. at 2176. Notwithstanding the claims of the Oklahoma Tax Commission to the contrary, it appears that the proponents of the bill to create Oklahoma did not think they

had to destroy tribal government or Indian reservations in order to accomplish their purpose.

The outgrowth of this summary review, is that clearly the *per se* rule of *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987) and *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985) remains applicable to Indian tribes in Oklahoma in general, and the Chickasaw Nation in particular. The corollary to this rule is that it is incumbent upon the Oklahoma Tax Commission to plead and prove specific unambiguous congressional authority both to levy and collect the particular taxes at issue, and to bring the instant lawsuit against the Chickasaw Nation. *See, County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, (1985); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985). Simply stated, state authority to tax an Indian tribe, and the authority of state courts to entertain a claim against an Indian tribe are completely pre-empted by federal law in the absence of Congressional action to the contrary. Therefore, this case was properly removed, and properly dismissed. *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987); *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1 (1983); *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922).

II. BOTH TRIBAL GOVERNMENT AND TRIBAL INDIAN COUNTRY ARE ALIVE AND WELL IN OKLAHOMA

The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U.S.C. § 1151, defining Indian country "notwithstanding the issuance of any patent" therein. . . . Congress was fully aware of the means by

which termination could be effected. *Mattz v. Arnett*, 412 U.S. 481, 504 (1973).

Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection. *United States v. Nice*, 241 U.S. 591, 598 (1916).

Viewing the Curtis act in the light of the previous decisions of this court and the dealings between the Chickasaws and the United States, we are of opinion that one of the objects occasioning the adoption of that act by Congress, having in view the peace and welfare of the Chickasaws, was to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of [taxation of non-Indians], subject to a veto power in the President over such legislation, as a preventive of arbitrary and injudicious action. *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904).

The argument of the Oklahoma Tax Commission may be summarized as follows: (1) the reservations of the Indian Tribes in Oklahoma must have been somehow extinguished in order for (a) allotments of land to take place or (b) citizenship to be extended to the members of the tribes or (c) for Oklahoma to be admitted to the Union, (2) without a reservation there can be no tribal government or tribal immunities; and, therefore, there are no tribal governments and no Indian Country in Oklahoma. Each step in this circular argument has been rejected by this Court.

A. INDIAN COUNTRY IN OKLAHOMA

But authority in respect of crimes committed by or against Indians continued after the admission of the

state [of Oklahoma] as it was before, in virtue of the long-settled rule that such Indians are wards of the nation, in respect of whom there is devolved upon the federal government "the duty of protection and with [sic] the power." The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the nation; and it rests with Congress alone to determine when that relationship shall cease.

. . . .

Viewed from that premise, it would be quite unreasonable to attribute to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment, and we find nothing in the nature of the subject-matter or in the words of the statute which would justify us in applying the term "Indian country" to the one and not to the other. *United States v. Ramsey*, 271 U.S. 467, 469, 472 (1926). (citations omitted).

The term "Indian Country" is perhaps first defined by statute in the Act of June 30, 1834, 4 Stat. 729 (1834) as "all that part of the United States . . . to which Indian title has not been extinguished", and included within its terms the area which now comprises the State of Oklahoma. The effect of the early statutes defining Indian country was summarized by the noted Indian law scholar, Felix Cohen, in his *Handbook of Federal Indian Law* 6 (1942 Ed.) as follows:

> Indian country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all.[3]

Although the 1834 definition of Indian country was not included in the Revised Statutes of the United States, and therefore repealed, it provided a useful mechanism for the Court to apply statutory laws relating to "Indian Country" and "Indian Reservations". *Donnelly v. United States*, 228 U.S. 243, 269 (1913). In a series of now famous cases, the Court developed a definition of "Indian Country" at common law which included Indian reservations, *Bates v. Clark*, 95 U.S. 204 (1887); *Donnelly v. United States*, 228 U.S. 243 (1913), trust and restricted Indian allotments, *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926), and areas set aside for the use and occupancy of Indians (dependant Indian communities) although not called a "reservation". *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. McGowan*, 302 U.S. 535 (1938).

In *Bates v. Clark*, 95 U.S. 204, 209 (1887) the Court stated:

> It follows from this that all the country described by the act of 1834 as Indian country remains Indian

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[3]The complete prohibition as to the application of state law in the Indian Country has been modified to the extent Congress has deemed proper. 18 U.S.C. § 1161 (liquor laws); Act of February 15, 1929, Ch. 216, 45 Stat. 1185 (health and education) (25 U.S.C. § 231); 25 U.S.C. §§ 232, 233 (New York); 18 U.S.C. § 1162 (criminal jurisdiction in Public Law 83-280 states); 28 U.S.C. § 1360 (civil jurisdiction in Public Law 83-280 states); 25 U.S.C. §§ 1321 *et seq.* (assumption and retrocession of civil or criminal jurisdiction by states which are not mandatory Public Law 83-280 states). Oklahoma was not granted, and has never assumed, jurisdiction over Indian country within its borders pursuant to Public Law 83-280.

> country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.

Although the Indian country status had been tied to aboriginal ownership of the soil, this Court in *Donnelly* extended the application of the term to lands reserved for tribes carved from the public domain. Tribal ownership, however, remained the benchmark indicia of Indian country status for Indian reservations as a historical consequence of the 1834 act. In pre-1948 decisions of this and other courts, as well as those cases which reiy without critical analysis upon such decisions, the ownership of title to the soil was often critical to the status of land as Indian country or "reservation" land.

The foregoing decisions left open the question of whether land within the exterior boundaries of an Indian reservation which was held in fee (in other words an "open" or "assimilated" reservation) was Indian Country. Cohen, *Handbook of Federal Indian Law* 8 (1942 Ed.). The practical effect of this "open reservation" issue was whether federal and tribal jurisdiction remained exclusive in reservation areas where allotments had been taken and the surplus sold, or where trust periods had expired, or where restrictions against alienation had been removed.

In 1948, Congress resolved this issue in favor of federal and tribal jurisdiction over trust or fee patented lands within reservations, and codified the Supreme Courts existing common law classifications of Indian Country by the Act of June 25, 1948, 62 Stat. 757, codified in its present form at 18 U.S.C. § 1151, which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

United States v. Mazurie, 419 U.S. 544, 547 (1975). Oklahoma was not excepted from the terms of this Act. The impact of this Congressional action was to render obsolete Court decisions which tied Indian Country status of Indian reservations to issues of land title, and to define by statute the territorial area for the operation of tribal government. The question of continuing land ownership remains relevant only in the context of Indian allotments outside Indian reservations. This Court, while often speaking in terms of "reservation" or "allotment" or "dependent Indian community" as relevant in a particular circumstance has, since 1948, clearly held that "Indian country" is the legally recognized term of art defining the territorial area for the exercise of tribal self-government. *United States v. Mazurie,* 419 U.S. 544 (1975)[4]; *DeCoteau v. District Court,* 420 U.S. 425 (1975)[5]; *United States v.*

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[4]"Cases such as *Worcester,* supra, and *Kagama,* supra, surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than "private, voluntary organizations." *Mazurie* at U.S. 557.

[5]In footnote 2 of the opinion, the Court stated: "If the lands in question are within a continuing "reservation," juris-

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John, 437 U.S. 634 (1978)[6]; *Solem v. Bartlett*, 465 U.S. 463 (1984).[7]

In response to this changed definition, this Court adopted a new rule to determine the Indian country status of reservation areas in *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District Court*, 420 U.S. 425 (1975), and *Solem v. Bartlett*, 465 U.S. 463 (1984). These cases teach that once an area of land has been set apart as an Indian reser-

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diction is in the tribe and the Federal Government "notwithstanding the issuance of any patent . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." While § 1151 is concerned on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." (citations omitted). After concluding that the Sisseton-Wahpeton reservation had been disestablished, the Court concluded: "In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. § 1151(c)." *Id.* at U.S. 446.

[6]At page 649 of the opinion, the Court stated: "With certain exceptions not pertinent here, § 1151 includes within the term "Indian country" three categories of land. The first, with which we are here concerned, is [Indian reservations]." In the accompanying footnote #17, the Court stated in part: "Inasmuch as we find in the first category a sufficient basis for the exercise of federal jurisdiction in the case, we need not consider the second and third categories [of Indian country]."

[7]In footnote 8 at page 467 of the opinion the Court stated: "Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of Congress fall within the exclusive criminal jurisdiction of federal and tribal courts." (citations omitted).

vation, all tracts within that area remain Indian country until the reservation is extinguished by Congress. The corollary to this rule is that the statute or treaty extinguishing the reservation must be clear on its face, or, if the statutory language could be interpreted to extinguish the reservation but is ambiguous, the legislative history and tribal understanding must clearly indicate an intent to terminate reservation status. Anything less than this clear language or showing of intent and understanding will result in a finding that the reservation continues as Indian country due to the traditional rules that ambiguities are to be resolved to the benefit of the Indians, and that Indian treaties and agreements must be interpreted as the Indians would have understood them.

Research has revealed no law applicable to the Chickasaw Nation containing language which this Court has held to extinguish a reservation boundary since 1948[8]. In fact, the allotment agreements of the Chickasaw Nation do not even contain general cession language similar to that which

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[8]In *Mattz v. Arnett*, 412 U.S. 481 (1973) the Court gave examples of language it considered clear expressions of the intent to extinguish reservation boundaries at footnote 22, page 504: "The Smith River reservation is hereby discontinued" from 15 Stat. 221 (1868); the North Half of the Colville Indian Reservation "be, and is hereby, vacated and restored to the public domain" from 27 Stat. 63 (1892); "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished" from 33 Stat. 218 (1904). The Ponca, Otoe, and Missouria reservations referenced were in Oklahoma, and the lack of such clear language with respect to other Indian Tribes in Oklahoma indicates that Congress only intended to extinguish these particular reservations. In fact, the section of this statute abolishing these three reservations acknowledges the continuing status of the Kaw (Kansas) Indian reservation in Oklahoma.

this Court determined to be suited to disestablishment but ambiguous in *DeCoteau v. District Court,* 420 U.S. 425 (1975), although these agreements do contain specific extremely limited cessions to the United States. These limited cessions, Act of July 1, 1902, § 64, 32 Stat. 641, the reservation from allotment of certain lands for tribal court-houses, jails, schools, and other tribal public buildings, *Id.* at § 26, the fact that Congress never clearly extinguished the boundaries of the Chickasaw reservation as it did the Ponca, Otoe, and Missouria reservations in Oklahoma, Congress' determnation to continue the tribal government of the Chickasaw Nation indefinitely, Act of April 26, 1906, § 28, 34 Stat. 137, 148 (1906), and the continued appropriations for certain Indian reservations in Oklahoma, annuities, and other federal protection[9], all emphasize that even though Congress believed that eventually the Chickasaw reservation would be extinguished and the tribal government terminated these events have not yet occurred.

Even assuming, *arguendo,* that the original boundries of the Chickasaw reservation—or any other reservation in Oklahoma for that matter—were terminated, it is clear that all Indian allotments remain as Indian country, 18 U.S.C. § 1151; *United States v. Ramsey,* 271 U.S. 467 (1926); *DeCoteau v. District Court,* 420 U.S. 425 (1975), as well as all land owned by tribes whenever acquired held in trust by the United States or restricted against alienation by force of 25 U.S.C. § 177. Tribal lands would constitute a diminished reservation via exception or reservation in specific allotment agreements, or via acquisition

[9]Act of March 1, 1907, 34 Stat. 1015; Act of April 30, 1908, 35 Stat. 70; Act of March 3, 1909, 35 Stat. 781; Act of April 4, 1910, 36 Stat. 269; Act of August 24, 1912, §§ 17, 18, 37 Stat. 497.

in trust or restricted status pursuant to federal law and 25 U.S.C. § 335 which was enacted to clarify the jurisdictional status of acquired lands by classifying acquired lands as Indian reservations or allotments.

Clearly, the determination of whether particular tracts of land in Oklahoma, as elsewhere, constitutes Indian country requires a scholarly judicial inquiry into the specific treaties, allotment agreements, and acts of Congress which affect the area and Tribe in question, not reference to wishful generalities and misapplication of law. Every Court which has considered the question in the modern context has determined that Indian country does exist in Oklahoma. *United States v. Littlechief,* No. 76-207-D (W.D. Okla., Nov. 7, 1977) followed and reprinted in *State v. Littlechief,* 573 P.2d 263 (Okla. Crim. 1978); *Cheyenne-Araphoe Tribes v. Oklahoma,* 618 F.2d 665 (10th Cir. 1980); *C.M.G. v. State,* 594 P.2d 798 (Okla. Crim.) cert. den. 444 U.S. 992 (1979); *Indian Country U.S.A., Inc. v. State of Oklahoma ex. rel. Oklahoma Tax Commission,* 829 F.2d 967 (10th Cir. 1987); *Ahboah v. Housing Authority of Kiowa Tribe of Indians,* 660 P.2d 625 (Okla. 1983).

B. TRIBAL GOVERNMENTS IN OKLAHOMA

> It rests with Congress to determine when the guardianship relation shall cease. Thus far Congress has not terminated that relation with respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers. Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. §§ 501 et seq. *Board of County Comm'rs. of Creek County v. Seber,* 318 U.S. 705, 718 (1943). (citations omitted).
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> Accordingly, we hold that the Curtis Act was repealed by the [Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501

et seq.] and that therefore the Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction, subject, of course, to the limitations imposed by statutes *generally* applicable to *all tribes*. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988). (emphasis by the court).

In our opinion, the purpose expressed in [Section 1 of the Oklahoma Enabling Act, 34 Stat. 267] to reserve to the government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject.

. . . . .

The reservaton of the authority of Congress to legislate in the future respecting the Indians residing within the new state is clearly supportable under the Federal Constitution, art. 1, § 8, which confers upon Congress the power "to regulate commerce . . . with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a state. *Ex Parte Webb*, 225 U.S. 663, 683 (1912).

Prior to 1890, the whole of what is now the State of Oklahoma was known as the "Indian Territory" with the exception of the Oklahoma panhandle and a relatively small area in the extreme southwest part of the State which was claimed by Texas. This area referred to prior to 1890 as the "Indian Territory" contained several Indian reservations of varying size, and large areas of land not assigned to any tribe but which had been ceded to the United States after the civil war by the Five Civilized Tribes (Cherokee, Creek, Choctaw, Chickasaw, and Seminole). The Act of May 2, 1890, 26 Stat. 81, created the Territory of Oklahoma out of what was basically the western two-thirds of this land area.

The significance of this action lies not in the creation of the Territory itself, but in the fact that thereafter the laws applicable to Indian tribes in the "Indian Territory" did not apply in the Territory of Oklahoma. That this was understood is shown by the allotment agreement of the Sac and Fox Nation of February 13, 1891, 26 Stat. 749, wherein it was recited "Whereas [the Jerome Commission] did . . . conclude an agreement with the Sac and Fox Nation of Indians, occupying a reservation in the Territory of Oklahoma, formerly a part of the Indian Territory."

Simply stated, research reveals no Act of Congress curtailing the governing authority of those Tribes situated within the Territory of Oklahoma as defined by the 1890 Act which are not applicable to Indian tribes throughout the United States. The Sac and Fox Nation has been said to have extensive powers of self-government. *Tenneco Oil Company v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984). The Osage Tribe, and its dependent Indian villages, are governed pursuant to the federal regulations, 25 C.F.R. Parts 90, 91 (1987). The Bureau of Indian Affairs maintains Courts of Indian Offenses for the tribes in the Anadarko Area Office jurisdiction (generally Oklahoma Territory) who do not have their own tribal courts, 25 C.F.R. § 11.1 (a) (19) (1987). Several tribes in western Oklahoma, includ-

ing the Sac and Fox Nation, the Kickapoo Tribe of Oklahoma, the Iowa Tribe of Oklahoma, the Absentee-Shawnee Tribe of Oklahoma, the Cheyenne and Arapaho Tribes of Oklahoma, and the Citizen Band Potawatomi of Oklahoma have established their own tribal courts and receive Bureau of Indian Affairs assistance in the funding of those courts and tribal law enforcement agencies to supplement tribal tax revenue and other tribal funds. The general powers of self-government of the tribes over those areas that remain Indian country in the area which comprised the Territory of Oklahoma remain undiminished. Cohen, Handbook of Federal Indian Law 779 (1982 Ed.).

As to the tribes which remained within the remnant of the Indian Territory after 1890, the situation is more complex. Some statutes affecting the tribes therein deal only with the Five Civilized Tribes, while others affected all tribes in the remaining Indian Territory, and others affected only specified tribes. However, for the purposes of this case, it is sufficient to note that, as to the government of the Chickasaw Nation, the Choctaw and Chickasaw allotment agreement ratified as Section 29 of the Curtis Act of June 28, 1898, 30 Stat. 495 provided:

> It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and of the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue . . . .[10]

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[10]The time limitation on the continuance of the Choctaw and Chickasaw governments contained therein was removed by the Act of April 26, 1906, 34 Stat. 148.

and this provision superceded any inconsistent provision of the Curtis Act.[11] Finally, Congress has exercised its superintending authority over the Five Civilized Tribes by confirming in them the right to recover any powers lost, to reorganize, 25 U.S.C. §§ 501 et seq., and to elect their own governing leadership, Act of October 22, 1970, 84 Stat. 1091, regardless of historical administrative treatment. There can be no doubt that the tribes in the Indian Territory as it was defined after 1890 retain substantial governmental authority.

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CONCLUSION

It is clear that the position of the Oklahoma Tax Commission is untenable. The shrill clamor and doomsday predictions contained in the brief of the Oklahoma Tax Commission are supported by neither law nor logic. Arizona and New Mexico, which were admitted into the Union by the same enabling act which admitted Oklahoma, apparently function very well as a part of the federal republic with extremely large Indian reservations and other areas defined as Indian country within their borders. There is simply no good reason to believe that the Indian tribes in Oklahoma are conceptually different from the Indian tribes in Arizona, New Mexico, and elsewhere in

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[11]*See, also,* Act of July 1, 1898, 30 Stat. 567, ratifying the allotment agreement with the Seminole Nation which states: "the courts of said nation shall retain all the jurisdiction which they now have, except as herein transferred to the courts of the United States." Another provision of the same agreement repeals all parts of the Act of June 7, 1897, 30 Stat. 62 "in any manner affecting the proceedings of the general council of the Seminole National." Although modified in a limited fashion, the Tribal governments of the Five Civilized Tribes continue to exist as Indian tribal governments entitled to the protection of

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the classical "Indian states", except as may be specifically otherwise provided by Congress.

For instance, the Cherokee Nation in Oklahoma and the United Keetoowah Band of Cherokees in Oklahoma constitute the lineal descendants and political heirs of the Cherokee Nation of the seminal cases of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The Shawnee, Wea, and Miami tribes who comprised *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) were later removed to the Indian Territory, Act of March 2, 1889, 25 Stat. 1013, I Kappler, Indian Affairs Laws and Treaties 414 (note), and allotted in what is now the State of Oklahoma.

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) is not instructive, except as it would relate to Indian activities outside the Indian country, because it fails to consider the impact of the 1948 definition of Indian country as expounded upon in later cases in this Court, and instead is limited to a discussion of the even then defunct federal instrumentality theory. Further, the land at issue here lies within the exterior boundary of the Chickasaw reservation, not in some area never occupied by the Chickasaw Nation as its reservation.

Likewise, *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) is irrelevant because it relies upon *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) which in turn is grounded upon the fact that the ability of the state to tax non-Indians engaged in transactions with Indians came from the

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Federal law, and having the right pursuant to 25 U.S.C. § 503 to reassume any powers previously lost in those limited modifications.

grant of authority from Congress found in Public Law 83-280. In *Moe*, the non-Indian was liable for the tax because Congress had not exempted taxation of non-Indians when the general Commerce clause preemption was removed by Public Law 83-280.[12] The non-Indian, because Congress had made state law specifically applicable to him, would be committing a crime by possession of unstamped cigarettes. These cases simply do not apply unless Congress has made state law applicable within the Indian country in question because no crime would be committed.

Finally, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943) was argued just ten days before *Board of County Com'rs of Creek Co. v. Seber*, 318 U.S. 705 (1943) was decided. These cases were decided prior to the 1948 statutory definition of Indian country, and the *Oklahoma Tax Commission* case clearly turned upon the fact that the statute there involved, Act of January 27, 1933, 47 Stat. 777, labeled certain land restricted and tax exempt, authorized taxes upon the oil and gas produced therefrom, and did not then make the funds consisting of mainly accumulated oil and gas royalties non-taxable in

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[12]*See, Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), in which the opposite result was reached, i.e., a white person was not taxable by the state regarding transactions with Indians in Indian country, in a state where the federal preemption barriers to state tax law as to non-Indians engaged in commerce with Indians had not been removed by Public Law 83-280. There is simply nothing magical about cigarettes, even though the Indians originally provided the tobacco from which they are made. The Warren Trading Post clearly imported processed goods into the Indian country simply to resell them. The logical and consistent legal underpinning of these cases and their progeny flows directly from the decision of Congress, expressed by statute, to allow state tax laws to apply to non-Indians within the particular Indian country areas at issue in *Moe* and *Washington*.

probate proceedings. The interpretation of this act to allow state inheritance taxes upon property specifically declared by Congress to be taxable by the state should not be a news item.

This Court has recognized the principal that the termination of the federal-Indian relationship and the abolishment of Indian country are matters which lie within the exclusive domain of Congress in so many cases that this rule is black letter hornbook law. In this case, Congress has abolished neither tribal government nor Indian country in Oklahoma, and has, in fact, just enacted the Act of October 17, 1988, 102 Stat. 2467 (25 U.S.C. § 2701) recognizing exclusive federal and tribal jurisdiction regarding bingo games such as those engaged in by the Chickasaw Nation at their motel/bingo/smokeshop complex at issue here. This Act, and particularly the tribal-state compact provisions relating to class three gaming, indicates that Congress does not anticipate state taxation of such businesses.

The decisions of this Court, from *Worcester* to the present all reflect, if not in analysis then in final result, a rule which could be stated: "Whenever in the Indian country any person is engaged in commerce (in its broadest sense) with an Indian or Indian tribe, then federal and tribal law completely preempt the application of state law, absent express and unambiguous Congressional action allowing the application of the state law in question." The

Court should affirm the decision of the United States Court of Appeals for the Tenth Circuit.

All of which is respectfully submitted,

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APPENDIX I

SELECTED PROVISIONS OF THE CONSTITUTION OF THE SAC AND FOX NATION[13]

PREAMBLE

We, The People of the Sac and Fox Nation, in order to promote the general welfare, provide for public peace and safety, establish justice, and to secure to ourselves and our descendants our common heritage and inherent right of self-government, as well as any rights or powers which may be granted to an organized Indian tribe pursuant to the Thomas-Rogers Oklahoma Indian Welfare Act of June 26, 1936, (49 Stat. 1967), and any other law of the United States of America, do hereby ordain and establish this Constitution of the Sac and Fox Nation, which shall supersede the constitution approved by the Secretary of the Interior on October 27, 1937, and ratified on December 7, 1937, as amended.

ARTICLE II—GOVERNING COUNCIL

SECTION 1. The Supreme Governing body of the Sac and Fox Nation shall be the Governing Council, having all powers herein delegated to it by this constitution. The membership of the Governing Council shall be all members of the Sac and Fox Nation eighteen (18) years of age and older.

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[13]Ratified July 24, 1987.

ARTICLE III—BUSINESS COMMITTEE

SECTION 1. There shall be a Business Committee which shall consist of the Principal Chief, Second Chief, Secretary, Treasurer, and one (1) Committee member who shall be elected by secret ballot.

a. The Principal Chief shall preside at meetings of the governing Council and of the Business Committee. He shall have general supervision of the affairs of the Governing Council and of the Business Committee, shall perform all duties appertaining to the office of Principal Chief, and shall see that the laws of the Sac and Fox Nation are faithfully executed.

b. . . . .

c. . . . .

d. . . . .

SECTION 2. The Business Committee shall have power to appoint subordinate committees and representatives, to transact business and otherwise speak or act on behalf of the tribe in all matters on which the tribe is empowered to act now or in the future and to hire and employ legal counsel to represent the tribe . . . provided that, the Governing Council shall have a veto power after actions by the Business Committee; provided further that, such veto power shall only be binding upon the Business Committee by two-thirds (⅔) majority vote of the Governing Council.

ARTICLE V—COURTS

SECTION 1. The judicial power of the Sac and Fox Nation shall be vested in one Supreme Court of the Sac and

Fox Nation consisting of five (5) Justices and such inferior courts as may be established by tribal law.

SECTION 2. The courts of the Sac and Fox Nation shall be courts of general jurisdiction and shall further have jurisdiction in all cases arising under the constitution, laws, and treaties of the Sac and Fox Nation. The Supreme Court of the Sac and Fox Nation shall have original jurisdiction in such cases as may be provided by law, and shall have appellate jurisdiction in all other cases.

SECTION 3. The Justices and Judges of the Sac and Fox Nation shall be selected by the Business Committee and confirmed by the Governing Council, provided that, Justices and Judges may be appointed by the Business Committee to hear a specific case at the request of the Supreme Court. A special appointment shall continue only until a final decision in the specific case has been reached.

SECTION 4. The Justices and Judges of the Sac and Fox Nation shall serve six (6) year terms beginning at the date of their confirmation in office and until their successor shall be duly confirmed and installed. At the expiration of his term of office, each Justice or Judge, at his option, shall be considered by the Governing Council for reconfirmation to a new term of office without opposition.

SECTION 5. Justices and Judges of the Sac and Fox Nation may be removed from office in the same manner that Business Committee members may be removed from office upon a showing of habitual neglect of the duties of office, oppression in office for personal gain or advantage, or conviction in any court of a felony or other crime involving moral turpitude. In no case may a Justice or

Judge be removed from office because of his decision or vote in any case before the court.

SECTION 6. The Tribal Courts are hereby specifically authorized to review, in any case before them, the actions of the Governing Council, the Business Committee, or any other tribal officers, agents or entities to determine whether those actions are prohibited by Federal or tribal law or this constitution. If it be found that the action complained of is not within the scope of authority delegated to that body or person by this constitution, or tribal law enacted pursuant to this constitution, or that the action is being undertaken in a manner prohibited by this constitution, tribal law, or Federal law, the courts are authorized to declare any such legislative or executive action unconstitutional and void, and to enter injunctive relief against unlawful actions by any executive officer or body of the Sac and Fox Nation.

ARTICLE X—BILL OF RIGHTS

The Sac and Fox Nation shall not:

1. Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble or to petition for a redress of grievances.
2. Violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

3. Subject any person for the same offense to be twice put in jeopardy.
4. Compel any person in any criminal case to be a witness against himself.
5. Take any private property for a public use without just compensation.
6. Deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for defense.
7. Require excessive bail, impose excessive fines, or inflict cruel and unusual punishment.
8. Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.
9. Pass any bill of attainder or ex post facto law.
10. Deny to any person accused of an offense punishable by imprisonment the rights, upon request, to a trial by jury of not less than six (6) persons.

ARTICLE XIV

CERTIFICATION OF APPROVAL

I, /s/ Ross O. Swimmer Assistant Secretary—Indian Affairs by virtue of the authority granted to the Secretary of the Interior by the Act of June 26, 1936, (49 Stat. 1967), and redelegated to me by 209 D.M. 8.3, do hereby approve this Constitution of the Sac and Fox Nation. It shall become effective upon ratification by the qualified voters of the tribe in an election in which at least thirty percent (30%) of those entitled to vote case ballots; provided,

that nothing in this approval shall be construed as authorizing any action under this document that would be contrary to Federal Law.

/s/ Ross O. Swimmer
Assistant Secretary—Indian Affairs

Washington, DC
Date June 19, 1987

APPENDIX II

SELECTED PROVISIONS OF THE FEDERAL CHARTER OF THE SAC AND FOX NATION[14]

ARTICLE VII
INDIAN REORGANIZATION ACT PROVISIONS

Pursuant to Section 3 of the Act of June 26, 1936, (49 Stat. 1967), and in addition to those powers and authorities vested in the Sac and Fox Nation by existing law, the following essential governmental powers, rights, and privileges secured to organized Indian tribes pursuant to the Act of June 18, 1934, (48 Stat. 984), are hereby conveyed to the Government of the Sac and Fox Nation.

a. Sections 2, 4, 7, 16, and 17 of the Act of June 18, 1934, (48 Stat. 984), are hereby extended to, and shall be in full force and effect as to the Sac and Fox Nation, and the Sac and Fox Nation shall in all respects be deemed upon equal footing, and shall be entitled to all the authority, right, and privileges of a tribe organized pursuant to the Act of June 18, 1934, (48 Stat. 984).

b. The Sac and Fox Nation shall have the right, power, and privilege to negotiate with the Federal, tribal, state, or local governments and to advise or consult with the representatives of the Interior Department on all activities of the Department that may affect the Sac and Fox Nation.

c. The Sac and Fox Nation shall have the right, power, and privilege to employ legal counsel for the protection and advancement of the rights of the Sac and Fox Nation and its members, the

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[14]Ratified July 24, 1987.

choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior so long as such approval is required by Federal law.

d. The Sac and Fox Nation shall have the right, power, and privilege to prevent any sale, disposition, lease, or encumbrance of tribal lands, corporate lands, interests in such lands, or other tribal or corporate assets, and to protect such lands and the interest of the tribe in such lands.

e. The Sac and Fox Nation shall have the right, power, and privilege to be advised by the Secretary of the Interior with regard to appropriation estimates for Federal projects for the benefit of the Sac and Fox Nation prior to the submission of such estimates to the Office of Management and Budget, or its successor, and to Congress.

f. The Sac and Fox Nation shall have the right, power, and privilege to make revocable or irrevocable assignments of tribal land pursuant to tribal law to members of the Sac and Fox Nation to tribal agencies, and to corporations wholly owned by the tribe, to make revocable or irrevocable assignments of tribal land pursuant to tribal law to any other person or entity if the land assigned was not owned by the Sac and Fox Nation at the time of ratification of this charter nor purchased by the tribe after the date of ratification of this charter with tribal claims monies held in trust by the United States or the interest earned on such tribal claims monies, except that assignments of such land may be made with the consent of two-thirds (⅔) of the Governing Council, and to regulate by law the use and disposition of all such assignments.

g. The Sac and Fox Nation shall have the right, power, and privilege to appropriate available tribal funds and to borrow money for public and

governmental purposes of the Sac and Fox Nation, to spend available funds appropriated for the use of the tribe by the United States or any other funding agency, and to invest such parts of such appropriated or borrowed funds as are not necessary for immediate expenditure and available for investment in any federally insured investment or any investment guaranteed and insured by any surety or insurance company authorized to give surety bonds to the United States pursuant to Federal law or to insure accounts of trustees, or in notes secured by first mortgages, at not more than ninety percent of appraised value, upon any real property located within the jurisdictional boundaries of the Sac and Fox Nation.

h. The Sac and Fox Nation shall have the right, power, and privilege to protect and preserve by law the property, natural resources, crafts, customs, traditions, health, peace, welfare, and safety of the Sac and Fox Nation, its members, and other persons associated with the tribe.

i. The Sac and Fox Nation shall have the right, power, and privilege to purchase, take by gift, bequest or otherwise, own, hold, manage, operate, and dispose of property of every description, real, personal or mixed, provided, that the Indian title to real property owned by the tribe may be sold, disposed of, or encumbered only pursuant to, and in conformance with, the provisions of an Act of Congress authorizing such sale, disposition, or encumbrance.

j. The Sac and Fox Nation shall have the right, power, and privilege to exercise such further powers as may in the future be delegated to the tribe by the Secretary of the Interior or by any duly authorized officer or agency of the Federal government.

k. The Sac and Fox Nation shall have the right, power, and privilege to enjoy, possess, and exercise any other right or privilege secured to an Indian tribe organized under the Act of June 18, 1934, (48 Stat. 984), as incorporated by reference through Section 3 of the Oklahoma Indian Welfare Act of June 26, 1936, (49 Stat. 1967), including all of those statutory or inherent rights and powers vested or recognized in such Indian tribes by existing law, and any powers and authority vested in a body corporate under the laws of the State of Oklahoma not inconsistent with the tribal constitution or this charter.

l. The Sac and Fox Nation shall have the right, power, and privilege to charter financial institutions and other business organizations and entities, and to authorize and license the doing of business by such institutions, organizations, and entities within the tribal jurisdiction in order to promote the use of the provisions of the Indian Financing Act of April 12, 1974, P.L. 93-262, (88 Stat. 78), the Snyder Act of November 2, 1921, (42 Stat. 208), the Indian Self-Determination Act of January 4, 1975, (88 Stat. 2206), and other Federal laws intended to promote industrial and economic development within the Indian Country, to otherwise promote economic and industrial development, and to tax and regulate by law such institutions, organizations, and entities.

m. To acquire land or any interest therein within the tribal jurisdiction and have such acquisition taken in trust for the Sac and Fox Nation pursuant to Section 5 of the Act of June 18, 1934, (48 Stat. 1984).

The foregoing express delegation of authorities is supplemental to, and expressive of, a portion of the general authorities delegated to the Business Committee in the Constitution of the Sac and Fox Nation and is designed and intended to take advantage of all of the delegations of authority from the Federal government to the government of the Sac and Fox Nation pursuant to the within noted, and all other Acts of Congress. This article shall therefore be interpreted in accordance with this intent, and shall not be deemed to constitute a limitation upon any power or authority which could be exercised by the government of the Sac and Fox Nation pursuant to this constitution without delegation of authority from the Federal government, nor to allow any of the powers and authorities stated herein to be exercised in a manner prohibited by the tribal constitution.

ARTICLE VIII
TRIBAL RIGHTS AND PROPERTY

Any rights and powers heretofore or hereafter vested in the Sac and Fox Nation, not referred to generally, expressly, or by implication in the constitution or charter of said tribe, shall not be abridged, but may be exercised by the members of the Sac and Fox Nation, through the ratification of appropriate amendments to the constitution or charter of the said tribe. No property rights or claims, nor the governmental authority of the Sac and Fox Nation, existing prior to the ratification of this charter shall be in any way impaired by anything contained in this charter. The tribal ownership of unallotted lands, whether or not occupied by any particular individual or agency, is hereby expressly recognized.

[Issued June 19, 1987, in Washington, DC, by Ross O. Swimmer, Assistant Secretary—Indian Affairs.]

No. 88-266

In The Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION, *Petitioner,*

v.

JAN GRAHAM, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE WYANDOTTE TRIBE OF OKLAHOMA, THE SENECA-CAYUGA TRIBE OF OKLAHOMA AND THE COMANCHE INDIAN TRIBE OF OKLAHOMA

AS AMICI CURIAE IN SUPPORT OF RESPONDENTS CHICKASAW NATION OF OKLAHOMA AND JAN GRAHAM

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BRIEF OF THE WYANDOTTE TRIBE OF OKLAHOMA, THE SENECA-CAYUGA TRIBE OF OKLAHOMA AND THE COMANCHE INDIAN TRIBE OF OKLAHOMA

CONSENT TO FILING

Both parties have consented to the filing of this Amicus Brief. The letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

The amici are all federally recognized Indian tribes which occupy federally-owned tribal trust lands within the State of Oklahoma. The tribes exercise a broad range

of self-governing powers within these lands and are engaged in various forms of economic development activities which generate revenues used to provide tribal programs and services for their members. These tribal powers of self government and efforts at economic self-sufficiency would be seriously undermined if this Court were to accept the legal arguments and factual assertions advanced by the Oklahoma Tax Commission in this case.

The Wyandotte Tribe is composed of approximately 3400 enrolled members and currently operates under a written Constitution approved by the Secretary of the Interior on May 30, 1985. The Tribe is the beneficial owner of approximately 188 acres of tribal land in northeast Oklahoma, which has been set apart and is currently held in trust for the Wyandotte Tribe by the federal government. The Tribe owns and operates a general store on its trust land.

The Wyandotte Tribe and the Oklahoma Tax Commission are presently engaged in litigation which is now pending before the Tenth Circuit Court of Appeals. Wyandotte Tribe of Oklahoma v. State of Oklahoma ex rel. Oklahoma Tax Commission, No. 88-1664 (10th Cir.). In that litigation, the Tax Commission is asserting, among other things, that the Tribe must collect state sales taxes on sales made to Wyandotte tribal members on tribal trust land, notwithstanding the clear line of authority from this Court to the contrary. See California v. Cabazon Band of Mission Indians, 480 U.S. _____, 94 L.Ed.2d 244, 258, n.17 (1987); Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985); McClanahan v. Arizona State Tax Comm., 411 U.S. 164 (1973). In that case, as in this one, the Tax Commission is arguing that Oklahoma state laws apply to tribal activities within "Indian Country ," 18 U.S.C. §1151, because Indian Country in Oklahoma is somehow different than Indian Country in every other state.

The Seneca-Cayuga Tribe, with 2300 members, is federally recognized and operates pursuant to a written Constitution approved by the Secretary of the Interior on April 26, 1937. Approximately 2000 acres of land in

northeast Oklahoma are held in trust for the Tribe. On this land, the Tribe has constructed and operates a high-stakes bingo parlor, a restaurant, a convenience store and a mobil home park. The revenues from these enterprises are used to fund important tribal programs and services.

The Seneca-Cayuga Tribe has first-hand knowledge of the dangers of litigating Indian law questions in Oklahoma state courts, as occurred in Oklahoma v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985). In that case, the Oklahoma Supreme Court upheld state jurisdiction over tribal bingo games, a result that was expressly rejected by this Court in California v. Cabazon Band. A federal district court in Oklahoma later found the state court's reasoning "obscure and confused," and the holding "contrary to federal law." As a result, it enjoined the enforcement of that state court judgment. Seneca-Cayuga Tribe of Oklahoma v. Oklahoma, Nos. 85-C-639-B and 86-C-393-B (N.D.Ok., June 5, 1986), 13 Ind. L. Rep. 3103 (1986).

The Comanche Indian Tribe is also federally recognized. It has approximately 8,000 members, and its activities are governed by a tribal constitution approved by the Secretary of the Interior on January 9, 1967. Approximately 5,200 acres in southwestern Oklahoma are still set apart and held in trust by the United States for the Comanche Tribe and the neighboring Kiowa and Apache Tribes, out of an original reservation that once exceeded three million acres.

Today, the only economic development effort that the Comanche Tribe has been able to sustain is the operation of two tribal bingo parlors, which provide much needed funding for a variety of tribal programs and services. These same bingo activities were approved by this Court in Cabazon and are authorized by Congress under the recently enacted Indian Gaming Regulatory Act of 1988, Pub.L. 100-497. Yet it is just this bingo revenue--derived from tribal activities on tribal trust land--that the Tax Commission claims in this case that it can tax under state law and enforce through state court proceedings.

The amici tribes, like the respondent Chickasaw Nation, are actively engaged in economic development activities to support and benefit their members. These efforts are fully consistent with current federal Indian policies, which seek to promote and foster tribal self-government through economic self-sufficiency. See California v. Cabazon Band, 94 L. Ed. 2d at 259-60 and ns. 19 and 20 (recognizing that congressional goal of tribal economic development is promoted through various legislative enactments, as well as President Reagan's 1983 Statement on Indian Policy); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983).

The positions advanced by the Oklahoma Tax Commission in this case would threaten the attainment of these goals by subjecting all Oklahoma tribes to complete state jurisdiction. As a result, the amici tribes have a substantial interest in opposing the State's wide-ranging attack on tribal self-government in Oklahoma by means of this Amicus Brief.

SUMMARY OF ARGUMENT

Reduced to its essentials, the Oklahoma Tax Commission's position in this case is that the State of Oklahoma, through its courts and administrative agencies, has full and complete jurisdiction over the activities of federally-recognized Indian tribes occurring on federally-owned tribal trust land within the State. It is unclear what position the State takes on the existence of federally recognized tribal governments within Oklahoma today.1/ In any event, the State argues that even if there

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1/ According to the State, all tribal governments in Indian Territory were abolished before the time of Statehood. Brief For The Oklahoma Tax Commission (hereafter "State's Brief") at 18, 19, 22. If this were so, the State has failed to explain how and why there are dozens of federally-recognized Indian tribes in Oklahoma today, including the respondent Chickasaw Nation and the amici Wyandotte, Seneca-Cayuga and Comanche Tribes. See 51 Fed. Reg. 25115 et seq. (1986)(listing of federally recognized tribes).

are now tribes in Oklahoma, they do not possess the usual attributes of sovereignty and self-government as possessed by tribes in all other states. Instead, the Tax Commission contends that Oklahoma Indian tribes are not "reservation tribes" but rather are "assimilated tribes." Because of this anomalous status, and because there are no reservations in Oklahoma, the State contends, Oklahoma tribes are subject to full state jurisdiction, including taxation, and are not therefore entitled to assert sovereign immunity against an unconsented suit by the Tax Commission against a tribal government to enforce state tax laws on tribal land. Moreover, the State argues that such a suit raises no federal question and therefore should be adjudicated in state, rather than federal, court.

The Oklahoma Tax Commission is asking this Court to adopt positions that are contrary to some of the most well-established principles of federal Indian law.2/ If accepted by this Court, there would then be two bodies of Indian law in this country: federal Indian law, which would apply in 49 states and Oklahoma Indian law, or state law, which would apply in one. The effect would be the de facto termination of all federally-recognized tribal governments in Oklahoma, for as this Court itself has noted, "a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." California v. Cabazon Band, 94 L.Ed. 2d at 254. This would affect not only the Chickasaw Nation and the amici tribes, but the other 37 federally recognized tribes in Oklahoma, as well.

2/ We recognize that different legal standards may apply depending on whether a state seeks to assert jurisdiction over Indian or non-Indian activities within Indian Country. See generally California v. Cabazon Band, 94 L. Ed. 2d at 258-59 and n.17. The Tax Commission makes no such distinction in its arguments here, however, instead seeking full state jurisdiction over all activities by any person or entity occurring on tribal trust land.

No such result is warranted in this case. A clear body of precedent from this Court and the Tenth Circuit Court of Appeals has established that the lands held in trust by the United States government for the Chickasaw Nation and other Oklahoma tribes are "reservations" and therefore "Indian Country" within the meaning of 18 U.S.C. §1151(a). In addition, the Oklahoma Tax Commission has advanced no persuasive argument as to why it should have greater civil jurisdiction within Indian Country than any other State. In the absence of such authority, the court of appeals was correct in denying the State's motion to remand and granting the Tribe's motion to dismiss on the basis of tribal sovereign immunity.

ARGUMENT

I. TRIBAL TRUST LAND IN OKLAHOMA IS A "RESERVATION" AND THEREFORE "INDIAN COUNTRY" AS DEFINED AT 18 U.S.C. §1151(a)

Inherent in virtually every aspect of the State's argument in this case is the contention that the activities of the Chickasaw Nation at issue here occurred "off the reservation." The State's repeated references to and discussion of Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), State's Brief at 5, 8-9 and 26-28, and its efforts to distinguish McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973), State's Brief at 11 and 27-28, are all predicated on the assumption that the Chickasaw tribal land held in trust for the Tribe by the United States in this case does not constitute a "reservation" for jurisdictional purposes.3/ Indeed, the State has

3/ In those companion cases, the Court set forth two broad principles of federal Indian law: that state laws generally are not applicable to tribal activities on an Indian reservation except to the extent that Congress has expressly authorized the application of state law, McClanahan; but that a tribal enterprise conducted off the reservation may be subject to non-discriminatory state taxation. Mescalero.

even framed the second question presented in its Brief as involving "activities conducted by an Indian tribe on off-reservation lands." Id. at i (emphasis added). If this assumption by the State is incorrect--if the tribal activities that the State seeks to tax here are in fact on-reservation activities--then the underpinnings of the State's overall argument have been swept away and the argument itself collapses.

Although the Tax Commission never says so directly, the importance of the "on-reservation" versus "off-reservation" distinction is important not for its own sake, but rather to determine whether the Chickasaw tribal lands are "Indian Country." That term, as defined at 18 U.S.C. §1151(a), includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government. . ." and applies to questions of both criminal and civil jurisdiction. California v. Cabazon Band, 94 L.Ed. 2d at 253, n.5. Indian Country generally denotes those areas within which federal and tribal jurisdiction are paramount, and state authority is extremely limited or non-existent. See generally DeCoteau v. District County Court, 420 U.S. 425, 427-28 and n.2 (1975). Therefore, in determining the extent of the State's regulatory jurisdiction in this case, the threshhold question is whether or not the tribal trust land on which the Chickasaw Nation is conducting its activities is an Indian reservation within the meaning of §1151(a), and, hence, Indian Country.

A. An Unbroken Line of Authority From This Court and the Tenth Circuit Has Held That Land Set Apart by the United States and Held in Trust for an Indian Tribe is a Reservation for Indian Country Purposes Under §1151(a)

Not surprisingly, the State has not cited or discussed a single case which analyzes the scope of Indian Country under §1151(a). The reason for this glaring omission is obvious, however. The most cursory review of the case law from this Court and from the Tenth Circuit Court of Appeals quickly reveals that land held in trust by the

United States for the benefit of a federally recognized Indian tribe, however it may otherwise be designated, constitutes a "reservation" for purposes of §1151(a).

This is not to suggest that the term "Indian reservation" has had one fixed or immutable meaning through time or for all purposes. In fact, the leading treatise on federal Indian law devotes four pages to discussing the origin, development and different usages of the term over time and in different contexts. Felix Cohen's Handbook of Federal Indian Law, 34-38 (1982 ed) (hereafter "Cohen"). Whatever its historical roots, however, there is now general agreement that the term "Indian reservation" as used in §1151(a) simply means land validly set apart for the use of Indians under the authority of the federal government, regardless of how the land achieved that status. See United States v. John, 437 U.S. 634, 648-49 (1978) (quoting United States v. Pelican, 232 U.S. 442, 449 (1914); Cohen at 34 and n.66.

The Tax Commission is incorrect when it states "Indian Country cannot be created by the operation of the statute which merely authorizes the acquisition of land in trust, rather, the status must be conferred by Congress and specifically proclaimed . . . ." State's Brief at 28 (punctuation in original). This Court expressly rejected that contention fifty years ago in United States v. McGowan, 302 U.S. 535, 538-39 (1938). In that case, the Court determined the status of a small tract of land purchased by the federal government and held in trust for homeless Nevada Indians. The land had never been formally designated as a "reservation" by Congress, but instead was characterized as the "Reno Indian Colony." The Supreme Court rejected the argument that the land was not Indian Country because it had never been expressly set aside as a "reservation." Instead, the Court held:

> Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations' . . . and it is immaterial whether

> Congress designates a settlement as a 'reservation' or 'colony.'

Id. As a result, the Court concluded that "it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian Country.'" Id. at 539.

Forty years later, the Court reached a similar conclusion in United States v. John, 437 U.S. 634 (1978). In that case, this Court reversed a judgment of the Mississippi Supreme Court and ruled that certain land held in trust by the federal government for the Mississippi Band of Choctaw Indians was a "reservation" within the meaning of §1151(a), despite the lack of a formal designation as such by Congress. The Court relied on McGowan and on United States v. Pelican, 232 U.S. 442, 449 (1914), in which reservation status had been based on a finding that the subject lands "had been validly set apart for the use of the Indians, as such, under the superintendence of the Government." Id. at 449. As a result, the Court in John found that the land held in trust for the Mississippi Choctaws, as a federally recognized Indian tribe, was a "reservation" and therefore "Indian Country" under §1151(a).

In addition to these cases, the State's Brief also ignores two recent decisions of the Tenth Circuit Court of Appeals specifically holding that tribal trust lands in Oklahoma are Indian reservations for purpose of §1151(a). The court of appeals did so first in Cheyenne Arapaho Tribes v. State of Oklahoma, 618 F.2d 665, 666-68 (10th Cir. 1980), primarily on the strength of United States v. John. In that case, the court held that lands set apart and held in trust for the tribe under a variety of different federal statutes all constituted Indian Country under §1151(a). More recently, the Tenth Circuit has subjected the question to even more rigorous analysis, and reached the same conclusion in a case involving the petitioner here. Indian Country, U.S.A. v. Oklahoma Tax Commission, 829 F.2d 967 (10th Cir. 1987), cert. denied _____ U.S. ___, 56 U.S.L.W. 3879 (June 27, 1988).

In Indian Country U.S.A., the Creek Nation of Oklahoma and an affiliated company sought declaratory and injunctive relief against the Oklahoma Tax Commission. The Commission alleged that it had complete jurisdiction over a Creek tribal bingo enterprise being conducted on Creek lands, including the right to tax and regulate the tribal games. The State argued that the tribal activities were not being conducted within Indian Country, or, alternatively, that even if they were, the State had complete jurisdiction nevertheless.

The appellate court rejected both arguments. In so doing, it carefully analyzed the scope, history and purpose of §1151(a), and the cases of this Court that have interpreted it. Id. at 973-76. After doing so, the court of appeals had no difficulty in finding that the tribal lands at issue in that case were Indian Country under §1151(a), as having been set apart by the federal government for the use and benefit of the Creek Nation.

As a result, the State's argument that the present case is controlled by Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) is without merit. That case generally held that tribal activities occurring off the reservation may be subject to state taxation. However, as just discussed, that is not the case here. In Mescalero, the land on which the tribe had constructed its ski resort was outside of the tribe's reservation boundaries, and was simply leased from the U. S. Forest Service under a 30 year lease. Id. at 146 (land was "adjacent to the reservation"). In addition, there is no indication that the Tribe exercised governmental authority over that leased land. Although not acquired in trust for the tribe, the Court summarily concluded that this lease arrangement was sufficient to bring the tribe's interest in that land within the immunity afforded by 25 U.S.C. §465. The Court then held that §465, which has no relevance to the case at bar, did not exempt the tribe's income, derived from that off-reservation leased land, from state taxation. Beyond this cursory analysis, however, the Court made no effort to define the status of the leased land. In particular, the Court did not determine whether

the land was "Indian Country" because §465 does not use that term or require that finding.

By way of contrast, the land at issue in this case is actually set apart and held by the United States in trust for the Chickasaw Nation, and lies within the Tribe's historical reservation boundaries. As such, this Chickasaw tribal trust land is clearly reservation land and Indian Country under the authority of Pelican, McGowan, John, Cheyenne-Arapaho and Indian Country, U.S.A.

As these cases amply demonstrate, then, the State is simply ignoring well-established precedent when it argues or implies that the Chickasaw tribal activities at issue in this case should be regarded as "off-reservation" activities for jurisdictional purposes.4/ In fact, these tribal trust lands plainly constitute a reservation and Indian Country under 18 U.S.C. §1151(a).

4/ In addition to Indian Country, U.S.A., the Tax Commission has had this same argument rejected recently by two other federal courts in Oklahoma, including one case involving the amicus Wyandotte Tribe. Those cases are now on appeal to the Tenth Circuit. It is this complete lack of success in federal court that has now prompted the Tax Commission to seek to litigate the issue in state court, where it knows that it is more likely to find a receptive ear. See, e.g., Oklahoma v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985)(holding that tribal sovereign immunity not a bar to suit in state court); Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission, _____ P.2d _____ (Okla. July 19, 1988)(holding, among other things, that Cabazon decision does not apply in Oklahoma).

B. The State's Argument Concerning The Supposed Disestablishment of All Indian Reservations and the Termination of All Tribal Governmental Powers in Oklahoma is Unpersuasive and Incorrect.

To buttress its argument for state jurisdiction over all Indian lands in Oklahoma, the Tax Commission devotes a substantial portion of its Brief to the contention that all Indian reservations in Oklahoma, including the Chickasaw Reservation, had been disestablished and all aspects of tribal sovereignty had been terminated by the time of Oklahoma's admission to the Union. State's Brief at 12-29. To establish these facts, the State bears a heavy burden. Disestablishment of a recognized reservation will not be lightly inferred, and the fact that surplus lands within a reservation are opened for non-Indian settlement does not conclusively establish that the reservation has been terminated. De Coteau v. District County Court, 420 U.S. at 444; Solem v. Bartlett, 465 U.S. 463, 470 (1984). Instead, a court must find unambiguous legislative language or clearly expressed congressional intent in order to find that a given reservation was, in fact, disestablished. Id. at 470-71; Mattz v. Arnett, 412 U.S. 481, 504-05 (1973). Likewise, tribal recognition by Congress, once established by treaty or other means, is presumed to continue unless and until it is terminated by clear and unambiguous legislation. Menominee Tribe v. United States, 391 U.S. 404, 412 (1968); United States v. Nice, 241 U.S. 591, 598-99 (1916).

The State's disestablishment argument is without merit for several reasons. First, and perhaps most simply, it is contrary to Congress' clearly expressed intent. The State's assertion that "Congress has since recognized that no reservations survived past statehood," State's Brief at 25, is best repudiated through Congress' own words. In 1936, Congress enacted the Oklahoma Indian Welfare Act (OIWA) 25 U.S.C. §501 et seq., to specifically address the status of Oklahoma tribes. That statute, passed approximately 30 years after the State

alleges that all reservations in Oklahoma had been terminated, authorized the Secretary of the Interior:

> . . . to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership. . . .

25 U.S.C. §501 (emphasis added). It seems difficult to understand why Congress would refer to "existing Indian reservations" in 1936 if all reservations had been eliminated before 1906. The reason, of course, is that all reservations in Oklahoma had not been terminated, and Congress clearly understood that fact.

The Tax Commission has cited legislative history of the OIWA to support a contrary conclusion. State's Brief at 25. Like much of the State's authority, however, it is fatally flawed. The State cites and quotes from S. Rep. No. 1232, 74th Cong. 1st Sess. (1935), which, it says, is the Senate Report accompanying the Oklahoma Indian Welfare Act of 1936. State's Brief at 25. However, that Report did not accompany the OIWA. In fact, it was the Report on an earlier version of the legislation that was rejected by Congress. It was in the next session of Congress that the OIWA was enacted, and in H. Rep. No. 2408, 74th Cong. 2nd Sess. (1936), which deals with the enacted version, there is a discussion of the problems in the earlier version and the intent of Congress in enacting the version that it did. In this later Report, it is stated:

> During the last session of Congress the Committee on Indian Affairs had before it H.R. 6234, a bill similar in purpose but containing many objectionable features. The Senate bill, as passed by the Senate on August 16, 1935, embodied some of the objectionable provisions. The committee has therefore devoted considerable time to a study of the legislation in an effort to prepare legislation satisfactory to the Indians, to the Department, and to the Cong-

> ress itself. This bill, in its revised form, has the endorsement of the Department; it has been advocated by representatives of numerous Indian groups; it is unanimously favored by the Oklahoma delegation in the House, and was unanimously reported by your committee.

The Report continues:

> Sections 3, 4, and 5 extend to the Oklahoma Indians the right to organize; to adopt constitutions; to receive charters; and to participate in loan funds and otherwise to enjoy the benefits of organization for general welfare purposes. In other words, these sections will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians out-side of Oklahoma by the Indian Reorganization Act of June 18, 1934.

(Emphasis added).

From this commentary it is apparent that Congress intended the Indian tribes of Oklahoma to enjoy the same general status as tribes elsewhere in the United States; a status that, by definition, requires a secure land base over which the tribe can exercise governmental authority. It would have been a hollow gesture, at best, for Congress to have extended powers of tribal organization and self-government to Oklahoma tribes under the OIWA, but for them to be denied that authority and be fully subject to state jurisdiction because their trust lands failed to constitute "Indian Country." By specifically designating them as "reservations" in the statute, it is clear that Congress fully intended to avoid the result proposed by the Tax Commission in this case.

Second, the State's argument is irrelevant. As this Court has noted, disestablishment of reservation boundaries primarily affects the jurisdictional status of non-Indian owned lands within the reservation; tribal lands and trust lands within the original boundaries retain their "Indian Country" character despite disestablishment.

Solem, 465 U.S. at 467, n.8; DeCoteau, 420 U.S. at 428. This Court has never held that lands currently held in trust by the United States for an Indian tribe within the boundaries of a disestablished or diminished reservation are subject to state jurisdiction.

The Tenth Circuit, with substantial experience in dealing with Oklahoma Indian law issues, has followed the same line of reasoning. Indian Country, U.S.A., 829 F.2d at 975, n.3. So, too, in Cheyenne Arapaho Tribes v. State of Oklahoma, the court of appeals presumed (and the tribes did not dispute) that the original reservation may have been disestablished by congressional action. 618 F.2d at 667. Nevertheless, the court found that tribal trust lands within the original reservation boundaries which had been retained by the federal government, and were now held in trust for the tribes, retained their reservation status for purposes of §1151(a). Id. at 668.

The same principle applies here. It makes no difference in this case whether the original Chickasaw Reservation was disestablished or diminished. If the lands on which the current tribal activities are taking place are within the boundaries of the original reservation (which they are) and if those lands are presently held in trust by the United States for the Chickasaw Nation (which they are) those lands retain their Indian Country status under §1151(a), and are not subject to general state jurisdiction.

Even if disestablishment of the original Chickasaw reservation were controlling, the authority relied upon by the Tax Commission is unpersuasive in that it falls far short of that required under Solem and DeCoteau. As those cases make clear, the history of the allotment period is confusing and inconclusive, with Congress' intentions and its actions often failing to correspond. While it is widely recognized that many members of Congress during that period presumed that the effect of allotment would be the general elimination of Indian reservations and the communal lifestyle that they fostered, Solem, 465 U.S. at 468, the legislation Congress adopted sometimes failed to accomplish that goal. Id. at

468-70. It is for this reason that federal courts now require clear legislative language or unambiguous congressional intent in order to find that a given reservation was, in fact, disestablished.

The State has offered neither type of evidence with respect to the claimed disestablishment of all Oklahoma reservations in general, or the Chickasaw Reservation in particular. According to respected Indian law scholars, the only legislation ever passed by Congress expressly disestablishing reservations in Oklahoma involved the Otoe Missouria and Ponca Tribes. Kirke and Lynn Kickingbird, Oklahoma Indian Jurisdiction: A Myth Unravelled, American Indian Journal, 4, 17 and n.109 (Fall, 1986). That legislation, Section 8 of the Act of April 21, 1904, 33 Stat. 189, 218, allotted those reservations and then plainly and unambiguously disestablished their original boundaries:

> Provided further, that the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished; and the territory comprising said reservations shall be attached to and become part of the counties of Kay, Pawnee and Noble, in Oklahoma Territory, as follows: . . .

Inasmuch as Congress clearly knew how to draft language to disestablish specific reservations in Oklahoma, it is significant that the State can point to no comparable legislative language with respect to the alleged disestablishment of the Chickasaw Reservation.

The State's reliance upon, and the conclusion it draws from, the Dawes Commission Reports are also unwarranted. These were reports to Congress, not reports by Congress. Therefore, they are of very limited value in attempting to ascertain what Congress actually did insofar as any particular reservation is concerned.

In addition, the reports were simply wrong insofar as they advised Congress that one result of the Dawes Commission's activities under the Curtis Act, Act of June

23, 1898, 30 Stat. 495, had been the abolition of all tribal governments within the Indian Territory. Such a view has been specifically rejected both by contemporary federal courts, Harjo v. Kleppe, 420 F.Supp. 1110 (D.D.C. 1976) aff'd sub nom. Harjo v. Andrus, 581 F.2d 949 (D.C.Cir. 1978), and by authoritative Indian law commentators. Cohen at 779-80, 781-84. As succinctly stated in Cohen,

> "[N]one of the federal legislation affecting the Five Tribes has terminated the federal relationship with the Tribes. Much of the legislation was reviewed in Harjo v. Kleppe, which held that the government of the Creek Nation was never terminated, and that the tribe possesses the powers necessary for self-government"

Id. at 784 (footnotes omitted). The treatise then quotes from Harjo:

> despite the general intentions of the Congress of the late nineteenth and early twentieth centuries to ultimately terminate the tribal government of the Creeks, and despite an elaborate statutory scheme implementing numerous intermediate steps toward that end, the final dissolution of the Creek tribal government created by the Creek Constitution of 1867 was never statutorily accomplished, and indeed that government was instead explicitly perpetuated.

Id. (quoting Harjo, 420 F. Supp. at 1118).

As a result, the State's position here that "the allotment of the land and the effacement of the tribal governments, were successfully obtained, " and that "the [Dawes] Commission had accomplished the reconstruction of the Territory in order to replace the several tribal governments with a constitutional state government," States Brief at 21, must be viewed merely as wishful thinking rather than legal reality. In fact, the "evidence" relied upon here by the Tax commission fails to establish that all Oklahoma reservations and tribal governments,

including those of the Chickasaw Nation, have ever been terminated.

To the contrary, the facts and the legal principles applicable in this case strongly support the conclusion that the Chickasaw lands at issue here are a "reservation" and constitute "Indian Country" within the meaning of 18 U.S.C. §1151(a). If this is so, then the State's reliance on Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) and its broader position that all tribal trust land in Oklahoma is "off-reservation" land must also be rejected.

II. STATE LAWS DO NOT GENERALLY APPLY WITHIN INDIAN COUNTRY IN OKLAHOMA

This Court should also reject the Tax Commission's further contention that state laws are generally applicable within Indian Country in Oklahoma. State's Brief at 29. The State has advanced no persuasive reasoning as to why its jurisdiction over Indian Country should be substantially broader than that of any other state, including Public Law 280 states.5/ P.L. 280 granted to certain states some measure of civil and criminal jurisdiction within Indian Country in those states. In construing that express congressional authorization, the Court has interpreted the grant of civil jurisdiction quite narrowly, recognizing the inherent threat to tribal self-government posed by the application of state law. In Bryan v. Itasca County, 426 U.S. 373 (1976), for example, the Court noted that subjecting tribes to the full range of state civil jurisdiction would "result in the undermining or destruction" of those governments, and "conversion of the affected tribes into little more than 'private voluntary organizations.'" Id. at 388; accord, California v. Cabazon Band, 94 L.Ed. 2d at 254.

In this case, Oklahoma seeks even broader state jurisdiction without reliance on any congressional enactment whatsoever. In the absence of such authorization, however, this Court should affirm the fact that the State of Oklahoma and its Tax Commission are bound by the same principles of federal law that apply in every other state.

5/ Public Law 83-280, Act of August 15, 1953, is codified in part at 18 U.S.C. §1162 and 28 U.S.C. §1360.

A. The State's Contention That Oklahoma Tribes Have Been Completely Assimilated Is Without Merit

To support its position, the Tax Commission would ask this Court to create a heretofore unknown classification of "assimilated tribes," that would include all tribes in Oklahoma. State's Brief at 29. If these assimilated tribes exist at all, according to the State, their governmental powers and immunities "have been swept away" and if the Chickasaw Nation or any other Oklahoma tribe retains any attribute of sovereignty, "it is sovereign only unto itself," id. at 38, but is otherwise fully subject to state law and state court jurisdiction.

This Court has already rejected this very argument in United States v. John, 437 U.S. 634 (1978). In that case, as here, the state argued that because "the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State," id. at 652, they were not entitled to federal protection and fully subject to state law. The Court disagreed, and held that continued federal recognition of the tribe as a tribe, rather than the degree to which individual members may or may not be assimilated into the non-Indian community, determines the extent to which federal and tribal, rather than state, jurisdiction applies on tribal trust land. Id. In addition, as was the case in John, the record before this Court is absolutely devoid of any persuasive evidence whatsoever to establish the fact that the Chickasaw Nation, or any other Oklahoma tribe, has been fully assimilated into the non-Indian community, id. at 652, n.23, or whether Oklahoma Indian tribes are any more or less assimilated than tribes of any other state. Rather than provide empirical evidence, expert testimony or the like, the Tax Commission would have the Court make this

far-reaching determination on the basis of one sentence from a Department of Commerce publication, State's Brief at 25-26,6/ and several sentences of dicta from Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943). State's Brief at 11-12.

That case, when fairly analyzed, does not support the unprecedented position for which the State cites it here.7/ First, the language quoted by the Tax Commission in its Brief did not even command the support of a majority of the Court. Justice Black wrote the plurality opinion, from which the State quoted, for four members of the Court, while an equal number joined the dissent. Justice Douglas concurred in the result and disposition, but without any indication that he adopted the patronizing language upon which the State focuses here.

Equally as important, this language, when read in context, does not support the State's argument in any event. Even given the broadest possible reading, it cannot be said that a majority of the Supreme Court was saying in 1943 that all Indian tribal governments within the State of Oklahoma had ceased to exist as a legal

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6/ The Department of Commerce has no statutory responsibility for Indian Affairs within the federal government, and the opinion expressed in a departmental publication of uncertain origin is entitled to no deference in the face of tribal recognition by the Secretary of the Interior.

7/ Cohen discusses Oklahoma Tax Commission in the broader judicial context in which it arose, Cohen at 421-24, and concludes that while "the result was not an abrupt change of doctrine. . . the plurality opinion relied on broad reasoning going well beyond the immediate issue." Id. at 422. The question involved in that case concerned the application of state inheritance taxes to the property of individual Indians. The Court's commentary on the status of Oklahoma tribal governments at that time, wholly unsupported by any factual information, was not necessary to decide the issue then before the Court.

matter.8/ Rather, the Court seemed to be commenting on what it viewed as the dormant and largely inactive state of those governments at that time and for some unspecified period in the past. However, both the plurality and dissenting opinions expressly recognized that the Oklahoma Indian Welfare Act of 1936 was intended and had begun to revitalize Oklahoma tribes. 319 U.S. at 603, n.5 ("under [the OIWA] some progress has been made in the restoration of tribal government"); id. at 613, n.1 ("They [the Five Civilized Tribes] still exist . . . and have recently been authorized to resume some of their former powers" [citing the OIWA]).

The brief, unflattering description of the status of Oklahoma tribes as of 1943 contained in Oklahoma Tax Commission is not unlike the well-documented history of the Mississippi Band of Choctaws outlined in United States v. John, 437 U.S. at 639-46. As John makes clear, however, the facts that an Indian tribe may be only the remnant of a once larger group, that its government may have lain dormant for years, that its members may have been granted state citizenship and that the Bureau of Indian Affairs may have periodically abandoned its supervisory role and permitted a state to exercise unauthorized jurisdiction over the tribe and its property, do not mean that tribal existence has been terminated or that tribal powers, if and when the tribe chooses to exercise them, have been diminished. Id. at 652-54. Certainly nothing in the dicta quoted by the State from Oklahoma Tax Commission suggests a contrary result with respect to all Oklahoma tribes in this case.

The State's assimilation argument also appears to be based on a mistake of fact. The Tax Commission argues that state jurisdiction over Indian Country in Oklahoma is warranted because Indian Country in Oklahoma is limited

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8/ That assertion would have been inconceivable, given the fact that just seven years before, in enacting the Oklahoma Indian Welfare Act, Congress has expressly referred to "[a]ny recognized tribe or band of Indians residing in Oklahoma. . ." 25 U.S.C. § 503.

to small, isolated tracts of no more than 160 acres, while Indian Country in other States involves large, well-defined, contiguous land areas. State's Brief at 29. Again, however, the State's "facts" are incorrect. The amici Seneca Cayuga and Comanche Tribes have tribal trust lands of 2,000 acres and 5,200 acres respectively. More importantly, the size of a tribe's trust land holdings does not determine its jurisdictional status. United States v. Pelican, 232 U.S. 442, 450 (1914) ("Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for federal purposes"). The Reno Indian Colony found to constitute a reservation for "Indian Country" purposes in United States v. McGowan, 302 U.S. 535 (1938), was less than 29 acres. Finally, there is nothing unique to Oklahoma's situation of having Indian lands interspersed with non-Indian lands. In California, for example, when Congress established reservations for the various Indian tribes under the Mission Indian Relief Act, 26 Stat. 712 (1891), it granted alternating sections of land to the tribes, resulting in "checkerboard" reservations which exist to this day. Notwithstanding the close proximity of Indian and non-Indian lands, these non-contiguous reservations are Indian Country and therefore outside of state jurisdiction. California v. Cabazon Band, 94 L. Ed. 2d at 252, n.1 and 253, n.5.

From the foregoing, it is apparent that the Tax Commission has failed to produce any valid justification for its claim that Oklahoma Indian tribes have been completely assimilated into the non-Indian populace, thereby giving the State complete jurisdiction over tribal activities on their trust lands.

B. The Existence of Indian Country in Oklahoma Does Not Unconstitutionally Deprive The State of Taxing Authority

As a final cornerstone underlying its position in this case, the Tax Commission asserts that it would be unconstitutional under the 10th Amendment to hold that Indian Country status under 18 U.S.C. §1151(a) deprives Oklahoma of the right to tax Chickasaw (and presumably all other) tribal activities on federally owned tribal trust land. State's Brief at 31-38. That question can be disposed of rather quickly, however.

First, this argument was not presented to or decided by the court of appeals or the district court. It is being presented for the first time here. This Court has a well-established rule that it will not address issues not raised or considered below, particularly constitutional issues, except under extraordinary circumstances. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 104-05 (1982); Rogers v. Lodge, 458 U.S. 613, 628 n.10 (1982); Adickes v. Kress & Co., 398 U.S. 144, 146 n.1 (1970). No extraordinary circumstances warrant consideration in this case. In fact, the question is prematurely raised in any event.

It its petition for certiorari, the Tax Commission has not asked this Court to address the validity of the underlying state taxes, nor is there any record before the Court on that question. This case, in its present posture, addresses only preliminary issues: in what court should the State's lawsuit be considered, and whether tribal sovereign immunity bars the suit entirely. There having been no decision by any court on the merits of the underlying taxation question, it is premature for the State to ask this Court to hold 18 U.S.C. §1151(a) unconstitutional before it has been applied to the particular facts of this case.

More importantly, the State's constitutional challenge is without merit. The State relies primarily on the reasoning of National League of Cities v. Usery, 426 U.S. 833 (1976) for the proposition that it would be an unconstitutional breach of state sovereignty under federalism principles to prevent it from taxing Indian tribes and their activities within its borders. However, Usery was expressly overruled and its federalism analysis expressly rejected by the Supreme Court three years ago in Garcia v. San Antonio Metro., 469 U.S. 528 (1985). More recently the Court rejected an invitation to resurrect the Usery approach to 10th Amendment analysis, holding that

"the States must find their protection from Congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." South Carolina v. Baker, 485 U.S. _____, 99 L. Ed. 2d 592, 602 (1988). As a result, if Oklahoma wishes to seek relief from the fiscal effect of having Indian Country within its borders, it must seek that relief from Congress, not this Court. Moreover, this Court has already upheld the constitutionality of tribal tax exemptions under federal law in Creek County v. Seber, 318 U.S. 705, 715-18 (1942).

In short, the State is arguing that the most basic principles of federal Indian law do not apply in Oklahoma, and that it should be allowed to play by rules different from those that apply in every other state that contains Indian Country. There is no reasoned basis for this position, and it should be rejected by this Court.

III. THE DECISION OF THE COURT OF APPEALS WAS CORRECT AND SHOULD BE AFFIRMED

The preceding sections of this Brief have sought to demonstrate why the arguments of the Oklahoma Tax Commission should be rejected, and why the usual principles of federal Indian law should guide the Court's disposition of the present case. Using this method of analysis, the Court should affirm the judgment below.

A. The State's Motion to Remand Was Properly Denied

In Caterpillar, Inc. v. Williams, 482 U.S. _____, 96 L. Ed. 2d 318 (1987) this Court recognized an exception to the well-pleaded complaint rule, for matters that have been completely preempted by federal law:

> Once an area of state law has been completely preempted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Id. at 328 and n.8. While the State acknowledges the existence of this principle, it argues, nevertheless, that its state tax claim against the Chickasaw Nation falls outside of its scope. State's Brief at 8-10.

We submit that it is hard to conceive of any area of the law that has been more completely preempted by federal law than Indian affairs in general, and taxation of Indian tribes in particular. This Court has recognized this fact on many occasions. County of Oneida v. Oneida Indian Tribe, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law"); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 154 (1980)("it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States").

Likewise, "the special area" of taxation of tribal activities on tribal lands is also preempted by federal law, California v. Cabazon Band, 94 L. Ed. 2d at 258, n.17 (and authorities cited there), as is the conduct of tribally sponsored bingo activities. Id. at 262. Yet, despite this overwhelming authority to the contrary, the State attempts to argue that it can file a lawsuit in state court to tax, among other things, Chickasaw tribal bingo revenues, without raising a federal question.

To support this ungrounded proposition, the State misperceives two important facts. First, it simply ignores the unique federal trust relationship between the United States government and Indian tribes. See United States v. Mitchell, 463 U.S. 206, 225 (1983) (discussing "the distinctive obligation of trust incumbent upon the Government" that has "long dominated the Government's dealings with Indians". It does so by arguing that the Tribe "is not controlled [by the federal Government] to any greater degree than a private business or association," State's Brief at 9, and that "the State and all of its citizens" share the same federal protection as provided to the Chickasaw Tribe. Id. at 10. These contentions are simply incorrect and cannot mask the existence of a well-

established sui generis relationship between Indian tribes and the federal government that is wholly encompassed within federal law. See United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes within 'Indian Country' are a good deal more than 'private, voluntary organizations' ").

The Tax Commission also suggests that because this Court on occasion has upheld state taxation in Indian law cases, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145, that the State can sue the Chickasaw Nation in this case without raising a federal question. Yet, what the State ignores is the fact that when this Court reviews those decisions, that alone demonstrates the existence of a federal question, because whether and to what extent state law applies in any given situation is, itself, a federal question based upon a federal common law balancing test. If no federal question were implicated, and if those cases involved nothing but state law issues, this Court would have no jurisdiction to review those decisions. See 28 U.S.C. §1257.

In sum, when the Oklahoma Tax Commission seeks to sue the Chickasaw Nation, or any other federally recognized Indian tribe, in state court to tax activities occurring on federally owned tribal trust land, it is not the master of its own claim. That claim is preempted by and necessarily arises under federal law. Caterpillar, 96 L. Ed. 2d at 328. The Court of Appeals was therefore correct in denying the State's motion to remand its claim to state court.

B. The State's Lawsuit Was Properly Dismissed On The Basis of Tribal Sovereign Immunity

The State's lawsuit against the Chickasaw Nation and a tribal employee acting within the scope of his employment was properly dismissed by the court below on the basis of tribal sovereign immunity. That immunity from unconsented suit is well recognized by this Court and by the Tenth Circuit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recog-

nized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"); Puyallup Tribe Inc. v. Department of Game, 433 U.S. 165 (1977); United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir. 1982); Ramey Construction Company v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 319-20 (10th Cir. 1982). The doctrine has also been recognized by Congress. 25 U.S.C. §450n(1).

Such immunity is rooted in the unique historical relationship between Indian tribes and the United States government: tribes are immune from suit because they are sovereigns predating the Constitution and because such immunity is necessary to preserve their autonomous political existence. Three Affiliated Tribes v. Wold Engineering, 476 U.S. _____, 90 L. Ed. 2d 881, 894 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance").

Such immunity is also jurisdictional. Ramey Construction Company, 637 F.2d at 318 (citing 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §3654 at 156-58 (1976). When properly invoked, sovereign immunity applies "irrespective of the merits" of the claim asserted against the tribe, Rehner v. Rice, 678 F.2d 1340, 1351, (9th Cir. 1982), rev'd on other grounds 463 U.S. 713 (1983), and the only proper disposition of the action is dismissal. United States Fidelity and Guaranty Co., 309 U.S. at 512; Puyallup Tribe Inc., 433 U.S. at 173.

The State is therefore incorrect when it contends that its lawsuit should not have been dismissed by the court below. That argument is essentially foreclosed by this Court's most recent analysis of the subject. In Three Affiliated Tribes v. Wold Engineering, the Court characterized tribal sovereign immunity as a "federally conferred" right, 90 L.Ed. 2d at 894 and then noted that:

> This aspect of tribal sovereignty, like all others, is subject to plenary federal control and

> definition. [Citation omitted]. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Id. In this case, as demonstrated above, there is no evidence of federal authorization permitting state jurisdiction over the Chickasaw Nation, or any diminution of the Tribe's federally conferred right of sovereign immunity from unconsented suit. As a result, the court of appeals was correct in dismissing the State's lawsuit on the basis of that immunity.

CONCLUSION

The Oklahoma Tax Commission has presented no valid authority or persuasive reasoning to support the unprecedented claims for state jurisdiction that it has made to this Court. Accordingly, we respectfully urge that the judgment of the court below be affirmed.

Respectfully submitted,

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